

BEFORE THE MONTGOMERY COUNTY
BOARD OF APPEALS

Office of Zoning and Administrative Hearings
Stella B. Werner Council Office Building
Rockville, Maryland 20850
(240) 777-6660

IN THE MATTER OF:
PETITION OF NORMAN ROSKIN, DVM AND
THE OLNEY-SANDY SPRING VETERINARY
HOSPITAL,

Petitioners

Alfred Blumberg
Glenn Cook
Gerald Henning
Norman Roskin

For the Petition

Joseph Lynott, Esquire
Attorney for the Petitioner

* * * * *

Martin Klauber, Esquire
People's Counsel for Montgomery County

Neither in Support nor it Opposition

* * * * *

Before: Françoise M. Carrier, Hearing Examiner

Board of Appeals Case No. S-1904-A
(OZAH Referral No. 05-38)

HEARING EXAMINER'S REPORT AND RECOMMENDATION

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I. STATEMENT OF THE CASE

Petition S-1904-A, filed on March 10, 2005, seeks to modify an existing special exception for a veterinary hospital located at 1300 Olney-Sandy Spring Road, on property known as Parcel A, Sandy Spring Veterinary Clinic, recorded as Plat No. 187974¹ in Plat Book 168, MNCPPC Plat No. 589-45 (Tax Account Number 08-1-03025597), in the R-200 Zone and the Sandy Spring-Ashton Rural Village Overlay Zone. The named petitioners, Norman Roskin, D.V.M. and the Olney-Sandy Spring Animal Hospital (the “animal hospital”) filed the present modification petition in response to a Notice of Violation (“NOV”) issued by the Department of Permitting Services (“DPS”), on December 17, 2002. The Hearing Examiner notes that only Dr. Roskin is listed as petitioner in the Board’s Opinion granting this special exception, and the special exception was specifically granted “to the petitioner only.” See Board Opinion dated March 2, 1992 at 1. If Dr. Roskin wishes the Olney-Sandy Spring Animal Hospital to be added as a co-holder of the special exception, or substituted for himself, he would be well advised to submit a request for administrative modification to effect that change. Dr. Roskin will be treated as the sole petitioner for purposes of this application.

The NOV identified violations of three conditions of the special exception: number 1 (Petitioner bound by all testimony and evidence submitted), number 3 (compliance with landscape, lighting and signage plan approved by Technical Staff at the Maryland-National Capital Park & Planning Commission (“MNCPPC”) after the special exception was granted), and number 7 (construction must conform to plans submitted as Exhibits 12 (c)-(d)). See NOV attached to letter dated December 30, 2002 from Katherine Freeman to Dr. Norman Roskin, in original case file. The NOV directed Petitioner to submit a request to modify the special exception to approve changes in the hours of operation, an increase in staff, a bay window on the front of the main building and a shed in the rear yard. The NOV further directed Petitioner to install all plantings required on the approved landscape plan.

The Petitioner represents that the hospital has installed the missing plants (see Exs. 18(j) and (k)) and removed the shed. He requests permission to maintain the current number of

¹ The application form lists Plat 18974, rather than Plat 187974. Technical Staff’s more complete description, provided in the Staff Report, is assumed to be accurate.

employees and operating hours and to add two parking spaces to accommodate the current level of activity.² He also seeks approval for (i) the as-built condition of the hospital building, including the bay window; (ii) flexible fencing added behind the building to enclose the dog-walking area; (iii) a sign installed at the driveway entrance; and (iv) the proposed installation of noise-reduction materials in the animal boarding areas.

On May 16, 2005, the Board of Appeals (“Board”) scheduled a public hearing in this matter for July 29, 2005, to be conducted by a hearing examiner in the Office of Zoning and Administrative Hearings. On July 21, 2005 the hearing was postponed, at the Petitioner’s request, to January 20, 2006. Due to the Petitioner’s past failure to submit required materials on a timely basis, the Hearing Examiner ordered all submissions deemed necessary by Technical Staff to be submitted no later than September 15, 2005. See Ex. 17. On September 14, 2005, Petitioner’s counsel submitted a number of exhibits including a site plan, a landscape plan and a traffic analysis. Technical Staff, however, found the traffic analysis inadequate. Due to Petitioner’s apparent attempt to comply with the September 15 deadline for submissions, on January 5, 2006, the Hearing Examiner set a new deadline of February 10, 2006 for submission of additional traffic information, and rescheduled the hearing to June 2, 2006. See Ex. 20.

Following its review of the modification petition, on May 16, 2006 Technical Staff wrote a letter to the Board requesting that the Board suspend the scheduled public hearing and instead hold a show cause hearing to address cited violations and a potential violation that was not noted in the NOV. See Ex. 24. Technical Staff also requested that DPS conduct an additional inspection. Staff’s letter noted that in the course of its review, Staff became aware that the subject animal hospital is conducting an on-site animal boarding operation that is not limited to regular patients, which Staff feels cannot be described as “purely incidental to the activities of the hospital” and which Staff found to be in violation of

² The Petitioner initially requested administrative approval of a modification to permit the current number of employees and hours of operation. That request was denied on grounds that the proposed modifications could change the intensity of the use and its impact on traffic and the immediate neighborhood. See Resolution dated January 22, 2003, effective March 18, 2003. A subsequent request for reconsideration was denied based on a lack of evidence of changed circumstances. See Resolution dated April 16, 2003, effective July 10, 2003.

the terms of the approved special exception. See *id.* at 2. Staff's letter reviewed the relevant provision of the Board's Opinion granting the subject special exception, as well as relevant evidence from the current case file. The Board considered Staff's letter at its meeting of May 24, 2006 and found that the evidence before it was "not conclusive as to whether boarding activity on the subject property constitutes a zoning violation." Rather than requesting that DPS conduct a site inspection, and perhaps due to the imminent date of the public hearing scheduled for June 2, the Board requested "that the Hearing Examiner address the question of the extent of animal boarding at the special exception site, as a matter of fact and law, in the context of" the scheduled modification hearing. See Ex. 28, Resolution adopted and effective May 24, 2006.

Technical Staff submitted a Staff Report dated June 1, 2006,³ which recommended *denial* of the modification on two grounds: (1) the facility does not meet the current sound requirements for a veterinary hospital under Section 59-G-2.32(b)(3) of the Zoning Ordinance; and (2) in Staff's view, animal boarding was at the time this special exception was approved, and continues to be, prohibited as a use accessory or incidental to a veterinary hospital. See Staff Report, Ex. 29. The Montgomery County Planning Board did not consider this matter.

The hearing was convened as scheduled on June 2, 2006, at which time testimony and other evidence were presented in support of the petition. No opposition was expressed during the hearing, nor is any reflected in the record. The Hearing Examiner acknowledged the inconvenience of receiving the Staff Report on the eve of the hearing, and offered Petitioner's counsel the opportunity to reschedule the hearing if he felt his client would be prejudiced by the late arrival of the Staff Report. Petitioner's counsel stated that in view of the long pendency of the case, his client would prefer to proceed. This first hurdle having been passed, the next question was what issues would be addressed at the hearing, in light of the Board's resolution requesting that the Hearing Examiner "address the question of the extent of animal boarding at the special exception site, as a matter of fact and law."

³ The Staff Report is liberally quoted and paraphrased in Part II of this Report.

Petitions to modify the terms or conditions of a special exception are authorized by §59-G-1.3(c) of the Zoning Ordinance. Section 59-G-1.3(c)(4) states:

The public hearing must be limited to consideration of the proposed modifications noted in the Board's notice of public hearing and to (1) discussion of those aspects of the special exception use that are directly related to those proposals, and (2) as limited by paragraph (a) below, the underlying special exception, if the modification proposes an expansion of the total floor area of all structures or buildings by more than 25%, or 7,500 square feet, whichever is less.

(A) After the close of the record of the proceedings, the Board must make a determination on the issues presented. The Board may reaffirm, amend, add to, delete or modify the existing terms of the special exception. The Board may require the underlying special exception to be brought into compliance with the general landscape, streetscape, pedestrian circulation, noise and screening requirements of 59-G-1.26, if (1) the proposed modification expands the total floor area of all structures or buildings by more than 25 percent, or 7,500 square feet, whichever is less, and (2) the expansion, when considered in combination with the underlying special exception, changes the nature or character of the special exception to an extent that substantial adverse effects on the surrounding neighborhood could reasonably be expected.

In the present case, no changes to the floor area of the hospital building are proposed. Petitioner's counsel, Joseph Lynott, argued correctly that, under the provision quoted above, the subject of the hearing should be limited to the four modifications that were identified in the Board's notice of hearing. Mr. Lynott agreed, however, to address "the extent of the animal boarding" as requested in the Board's resolution. Tr. at 6. Mr. Lynott read that resolution as raising the question of whether the animal hospital is exceeding the level of animal boarding operations approved in 1992, not whether the Board's decision to allow boarding as an accessory use should be re-examined. *Id.* at 6-7. In Mr. Lynott's view, the Petitioner has an equitable right to continue the non-medical boarding use as approved in 1992.

The Hearing Examiner conducted preliminary questioning of the Dr. Roskin to determine whether the non-medical boarding operation should be considered "directly related" to the modification proposal, for purposes of Section 59-G-1.3(c)(4). The results of this questioning suggested that non-medical animal boarding is a very small part of the practice, and that the increases in employment and parking spaces that are the focus of the proposed modifications were driven by expansion of the hospital operations, not non-medical boarding. Accordingly, absent consent from the Petitioner to

present evidence related to non-medical boarding, the scope of the hearing would have been limited to the four modifications identified in the notice of hearing. The Petitioner chose, however, through counsel, to present evidence relating to all of the operations at this site, including non-medical boarding, in order to respond to the Board's Resolution. See Tr. at 38-42.

Subsequent to the hearing, the Petitioner submitted more detailed information about the increase in employees for which approval is not requested. See Supplemental Statement of Operations, Exhibit 55(g). This information clarified that the number of employees responsible for taking care of animals in the non-medical boarding ward has increased, in keeping with increased levels of boarding activity. Accordingly, the proposed modification is directly related to increased activity levels in the non-medical boarding facility, which confers clear jurisdiction upon the Hearing Examiner and the Board of Appeals to address the question of the whether the non-medical boarding operation is in compliance with the terms and conditions of the special exception.

The public hearing in this case concluded on June 2. The file was held open for a considerable period of time to allow Petitioner to develop noise-reduction measures, to permit Technical Staff review of those measures, and to permit Petitioner's counsel to brief salient legal issues. The record closed on September 1, 2006, was reopened briefly to provide additional time for Technical Staff comments, and closed on September 18, 2006. The record was then reopened on October 13, 2006 to accept an additional submission from the Petitioner in response to Technical Staff's comments, and closed on November 21, 2006. By Order dated December 13, 2006, the Hearing Examiner extended the time for submission of her report and recommendation by four weeks, from December 21 to January 18. The later discovery of a need for clarification of the Petitioner's position with regard to noise mitigation measures resulted in correspondence between the Hearing Examiner and Petitioner's counsel. The record was reopened on January 31, 2007 to admit this correspondence into the record, and closed for the last time on February 15, 2007.

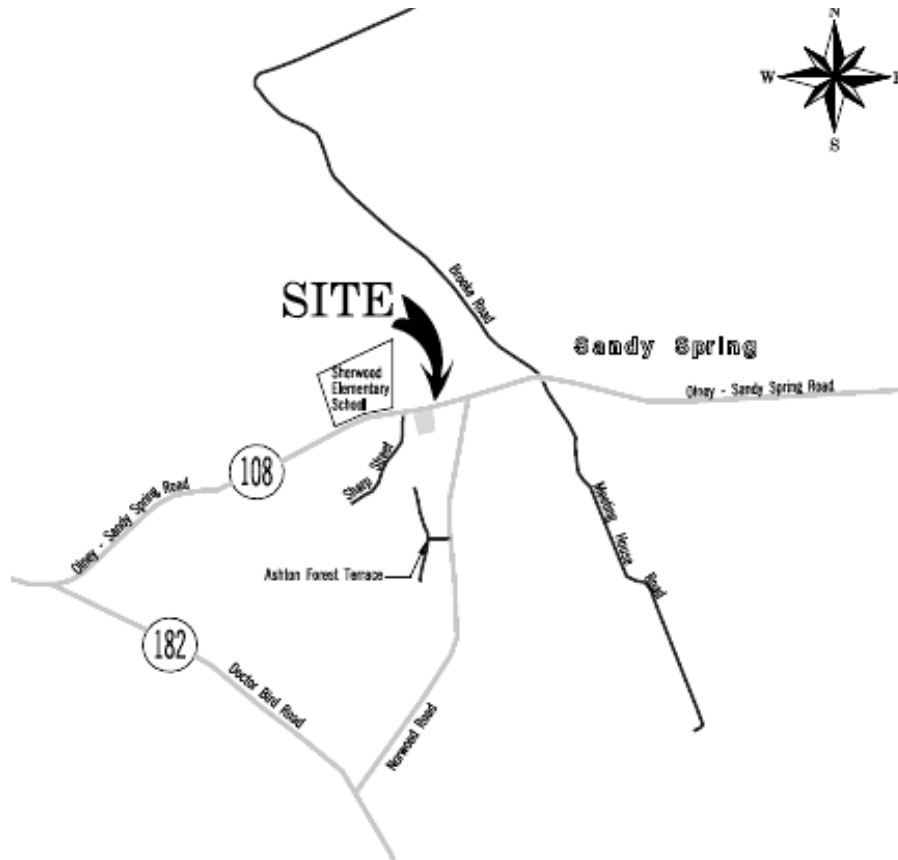
II. BACKGROUND

For the convenience of the reader, background information is grouped by subject matter.

A. The Subject Property and Neighborhood

The subject property consists of 1.4 acres located at 1300 Olney-Sandy Spring Road (Rte. 108) in Sandy Spring, on the south side of Rte 108, about 350 feet west of its intersection with Norwood Road. Its general location may be seen on the area map below.

Area Map, from Ex. 55(f)



The property is irregularly shaped and slopes gently down to the rear. It is heavily wooded, especially in the northern and eastern parts of the site, with grassy areas around the building and the parking lot. There are substantial conservation easements in all four directions from the site, a stormwater management easement and right-of-way in the southwest corner of the site, and a public utility easement along the north side of the property, facing Rte. 108. The site is developed with a one-story veterinary hospital, a 22-space parking lot and a fenced enclosure in the rear, and is classified under the R-200 Zone and the Sandy Spring/Ashton Rural Village Overlay Zone (the “Rural Village Overlay Zone”). Photographs of the front and interior of the hospital, and an aerial view, follow.

Front of Hospital Building, Seen from Rte. 108, Ex. 35



Front Lobby with Reception Area and Retail Display, Ex. 37



Aerial View of Subject Site, from Staff Report

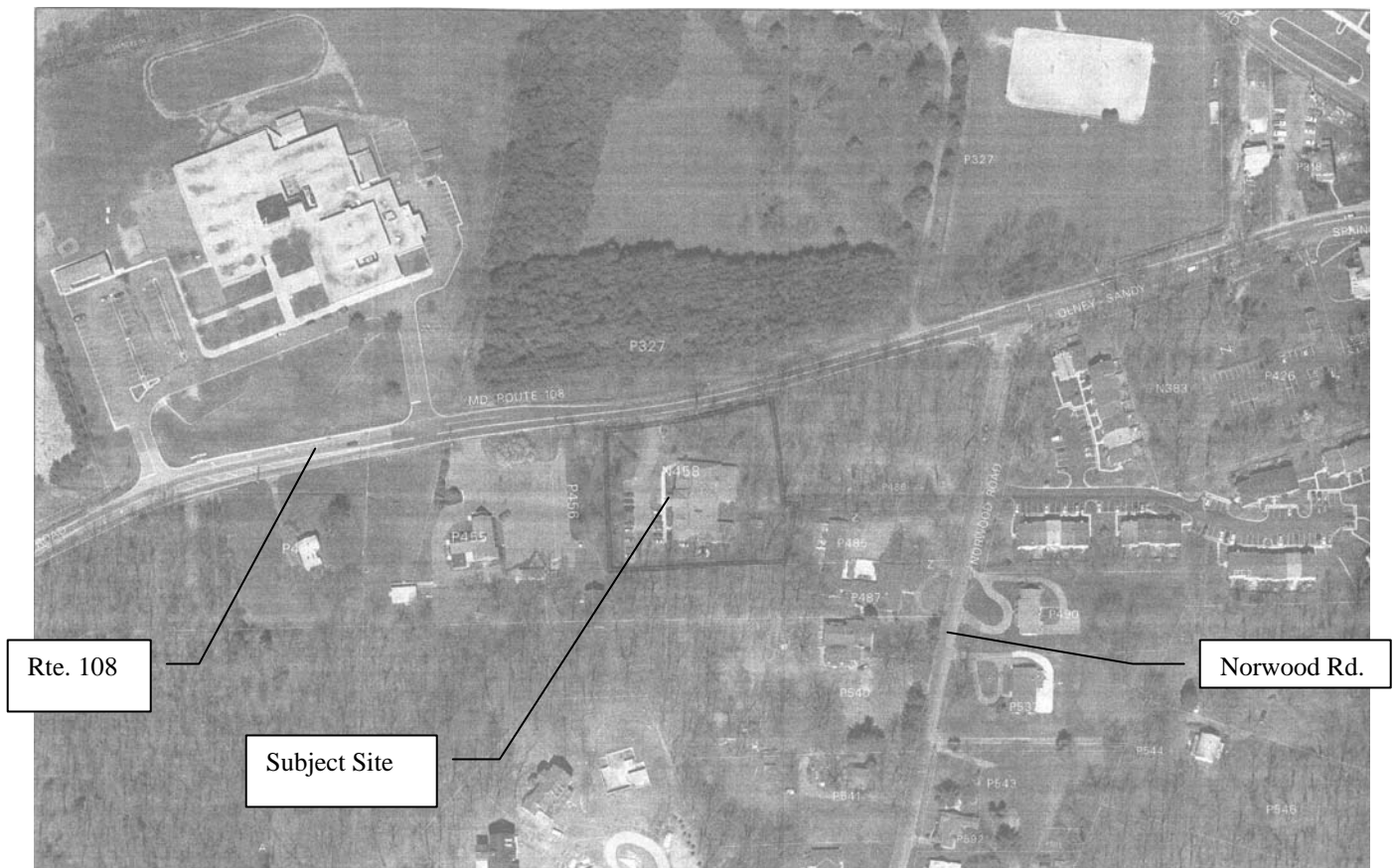
The subject site sits just west of the Sandy Spring Village Center. Abutting the site to its west, also within the R-200 Zone and the Rural Village Overlay Zone, is a boarded-up building known as the Odd Fellows Lodge, which is a master plan-designated historic resource. This building is accessed from the parking lot of the adjacent Sharp Street United Methodist Church to the west, which is also a master plan-designated historic resource and is located in the RE-2 Zone. Technical Staff consulted Historic Preservation Staff at the MNCPPC, who found that the proposed modification would not affect these two historic sites. See Staff Report at 10.

Aerial photographs indicate that the church abuts vacant, wooded land to the south and a single-family home on a one-acre-plus site to the west. Confronting the church and the adjacent single-family home across Rte. 108 is Sherwood Elementary School, on land classified under the RE-2 Zone. Confronting the subject site across Rte. 108 is a large, partially wooded homestead site owned by the Ligon family, which is classified under the RE-2 Zone. To the east, roughly the northern half of

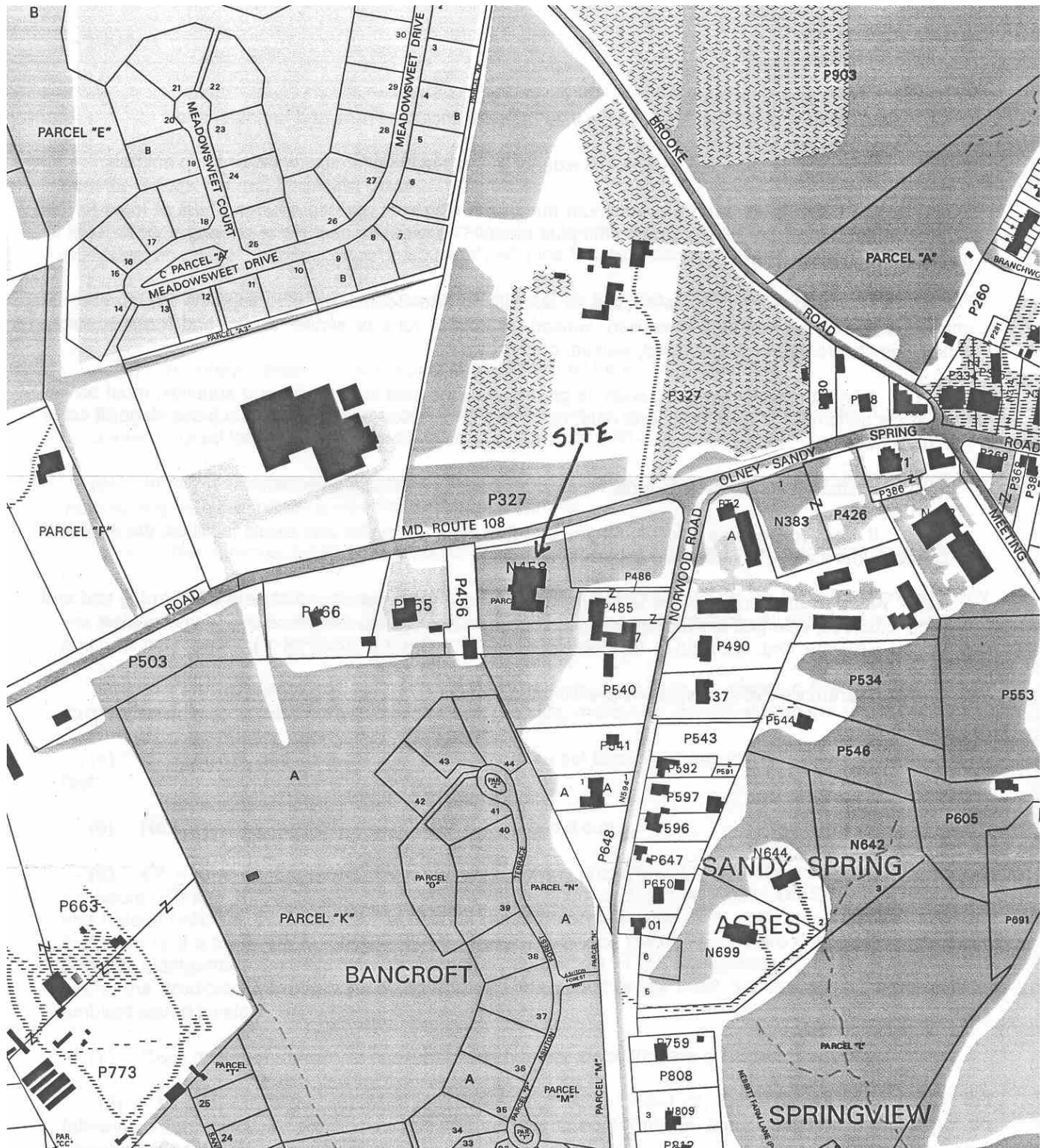
the subject site's eastern boundary abuts a vacant, wooded lot also owned by the Ligon family, at the corner of Rte. 108 and Norwood Road. The southern half of the subject site's eastern boundary abuts the rear yard of a single-family house, in the R-200 Zone and the Rural Village Overlay Zone, which faces Norwood Road and was recently the subject of a withdrawn application for a group home special exception. A wooded, back portion of this lot extends along the southern boundary of the subject site. South of this home on both sides of Rte. 108 are single-family detached homes on large lots, some in the R-200 Zone and the Rural Village Overlay Zone, and some in the RNC (Rural Neighborhood Cluster) Zone. The southeast corner of Rte. 108 and Norwood Road is occupied by a townhouse development abutting the Village Center, in the R-T 10 Zone.

The Hearing Examiner considers the general neighborhood of the subject site to include the uses described above. The relationship of the subject site to surrounding uses may be seen on the aerial photograph and vicinity map that follow.

Aerial Photograph, Ex. 47



Vicinity Map from Staff Report



B. Land Use History

The Board of Appeals granted a special exception to Dr. Roskin on March 2, 1992 to permit the construction of a veterinary hospital on the subject site. The Board Opinion granting the special exception (the "Opinion") describes the planned facility as a two-story building of just over 10,500 square feet, with 9,000 square feet on the first floor for the hospital, and an apartment on the second floor measuring approximately 1,500 square feet, to be occupied by an employee who was to care for the animals when the hospital was closed. The building was to be constructed of brick and wood "and completely soundproofed." Opinion at 2. The Opinion details Dr. Roskin's testimony concerning the specific hours of operation proposed for the hospital, the services to be provided, the hours for appointments and the number of employees. The testimony described the hospital as a small animal facility providing medical and/or surgical services plus routine bathing, dipping and grooming, and the sale of pet supplies. Opinion at 2. The Opinion contains the following language concerning non-medical animal boarding, which has become a contested issue in the present proceeding (*id.*):

Dr. Roskin testified that he would occasionally board animals for his regular clients. He stated that there would be no runs or other facilities outside for the boarding of animals and that any boarding would be purely incidental to the activities of the hospital.

The special exception was granted subject to several conditions, including a requirement (as was common practice at the time) to submit a landscape, lighting and signage plan to Technical Staff for review and approval, with two copies to be submitted to the Board for its records. Other conditions included an obligation to maintain and replace plant material as necessary, and a requirement that "[c]onstruction must conform to plans submitted as Ex. Nos. 12(c)-(d)." Opinion at 3. Exhibit 12(d) contained building elevations and an interior floor plan. Exhibit 12(c) was a site development plan depicting a two-story building with 9,043 square feet on the first floor, 1,500 square feet on the second floor and a height of 41 feet. Exhibit 12(c) also depicted a parking facility with 27 parking spaces. The landscape plan that was approved by Technical Staff, however, depicted 22 parking spaces, the rest having been replaced with landscaping. In light of the changes made on the

landscaping plan, a modification of the approved site plan would have been the only way for the hospital to comply with all of the terms of the special exception.

As noted in Part I above, DPS issued an NOV for this site on December 17, 2002, which identified violations of conditions number 1 (Petitioner bound by all testimony and evidence submitted), 3 (compliance with landscape, lighting and signage plan approved by Technical Staff), and 7 (construction must conform to plans submitted as Exhibits 12 (c)-(d)). The NOV directed the Petitioner to submit a request to modify the special exception to approve changes in the hours of operation, an increase in staff, a bay window on the front of the main building and a shed in the rear yard. The NOV further directed the Petitioner to install all plantings required on the landscape plan that was approved by the MNCPPC. Petitioner represents that the hospital has installed the missing plants (see Exs. 18(j) and (k)) and removed the shed. He requests permission to maintain the current number of employees and operating hours, and to add two parking spaces to accommodate the current level of activity.

As discussed in Part I, Technical Staff observed an additional potential violation of the Zoning Ordinance and the special exception during the course of its review, namely, the non-medical boarding operation. In addition, the Hearing Examiner observed, in comparing Exhibits 12(c) and (d) with plans showing the as-built conditions, that construction differed from Exhibits 12(c) and (d) in minor ways other than the bay window. Certain additions have also been made to the site, namely fencing in the rear and an identification sign at the driveway entrance, for which Petitioner now seeks approval.

The evidence presented during the hearing also established that the existing building does not meet current noise standards under Section 59-G.2.32, which specifies that veterinary hospitals existing before its enactment in 2002 are considered conforming uses, and may be modified consistent with its provisions. Accordingly, any modification of the special exception requires those elements of the use affected by the modification to come into compliance with current standards. As discussed in more detail later in this report, Petitioner has both proffered noise mitigation measures to achieve this compliance and argued that the hospital should not be made to comply.

C. Master Plan and Overlay Zone

The subject property is in the area covered by the *1998 Sandy Spring/Ashton Master Plan* (the “Master Plan”). Community-Based Planning Staff at the MNCPPC notes that the subject animal hospital was approved and built before the adoption of the Master Plan, and was found to be compatible with surrounding uses when it was approved in 1992. The Staff Report concludes that “there are no master plan issues affecting this application.” Staff Report at 10.

The Petitioner’s land planner, Alfred Blumberg, opined that the proposed modification would comply with the Master Plan, whose provisions have been incorporated in the Rural Village Overlay Zone. See Tr. at 161; Ex. 18(e). The Rural Village Overlay Zone was created to:

- (a) Preserve and enhance the rural village character of the Sandy Spring and Ashton village centers by ensuring an attractive and traditional pattern of houses, commercial establishments, open spaces and their relationship to roadways.
- (b) Encourage a compatible relationship between new or expanded houses or businesses and traditional neighboring structures that reflects the best of local village character, particularly in terms of scale, siting, design features, and orientation on the site.

Zoning Ordinance Section 59-C-18.181.

Mr. Blumberg observed that the subject site is located at the western edge of the Rural Village, which covers a distance of 1.35 miles. He opined that the subject use and site fit well within the village concept: the building architecture reflects the rural character of the area, with a peaked roof and multiple dormers that create the appearance of a two-story, residential structure consistent with other construction in the area; the building is not very noticeable on Rte. 108, given that it is visible only looking up the driveway, it is set far back from the road and it faces west, with its short side along Rte. 108; and the building is surrounded by woods. Mr. Blumberg suggests that although many commercial uses in the Village Center are situated very close to Route 108, with virtually no landscaping or screening, the subject site, located at the edge of the Village Center with its substantial setbacks and screening, creates a transition from the residential zones to the more commercial uses within the Village Center. See Ex. 18(e).

D. Proposed Modification

The Petitioners filed the subject modification petition to request approval for (i) the existing hours of operation, which are slightly longer than those approved in the original Opinion; (ii) an increase in the number of employees, from 12 in the original approval to the current total of 25 full-time and part-time employees, with no more than 18 on site at one time; (iii) the bay window on the front of the building; (iv) an increase in the number of parking spaces from the 22 existing to a total of 27, as originally approved. No changes were proposed in the nature of the use or the services provided, the exterior of the building, its interior layout, or the footprint of the parking area.

The present petition has been amended to limit the requested parking to an increase of two spaces, from 22 to 24, rather than the 27 parking spaces shown on the site plan approved in the original Opinion. The request for a total of 24 spaces was driven, at least in part, by a desire to avoid the site plan review requirements of the Rural Village Overlay Zone, which requires a property to go through Planning Board site plan review if, among other things, parking spaces are to be added that would require the approval of a new parking facilities plan under Section 59-E-4.1. A new parking facilities plan is required for any parking facility with 25 or more spaces – thus the importance of keeping the parking facility to 24 spaces.

The present modification request evolved during the course of the hearing. Petitioner added a request that the Board approve the as-built condition of the building exterior, which is different from the approved plans in several minor ways. Petitioner also requests approval for flexible fencing that has been added in the rear of the building to enclose the area where dogs are walked, and for a sign near the end of the driveway. (The Hearing Examiner notes that the specific conditions for the use require fencing around the outdoor exercise area.) In addition, to satisfy the current noise requirements for the veterinary hospital use, Petitioner requests to modify the interior of the hospital to add noise mitigation materials in the boarding areas. The requested modifications are discussed below.

1. Hours of Operation and Staffing

The Board's 1992 Opinion in this case listed the hours of operation as follows:

8:00 a.m. to 8:00 p.m., Monday through Friday
9:00 a.m. to 5:00 p.m. Saturdays

The Petitioners now seek approval for the actual, current hours of operation:⁴

7:00 a.m. to 7:30 p.m., Monday through Thursday
7:00 a.m. to 6:00 p.m. Fridays
8:00 a.m. to 5:00 p.m. Saturdays

The current hours represent a net increase of 30 minutes in the hours of operation Monday through Thursday, a net decrease of one hour on Fridays, and a net increase of one hour on Saturdays.

The Board's Opinion in this case stated that the hospital would have 10 to 12 staff members, consisting of three veterinarians, three receptionists, two veterinarian technicians, two kennel staff and two bathing/groomers. Two of the veterinarians were expected to see patients on an appointment schedule. The appointment hours were to be:

9:00 a.m. to 12:00 p.m., 2:00 – 3:00 p.m. and 4:00 to 7:00 p.m., Monday through Friday
9:00 a.m. to 1:00 p.m. on Saturday

Petitioner now requests approval for a total of 25 full- and part-time employees, with no more than 18 staff members on site at one time, including veterinarians. See Ex. 18(a). Dr. Roskin explained that the increase in staff is necessary to support a fourth veterinarian (the hospital currently has five veterinarians on staff, but no more than four are on site at any one time) and a larger number of patients than in 1991. Dr. Roskin stated that the hospital reaches its peak of 18 employees only

⁴ Petitioner submitted conflicting evidence concerning the current hours. The hours listed in the Amended and Restated Summary Statement in Support of Modification, submitted on September 21, 2005 (Ex. 18(a)), were slightly different from those described by Dr. Roskin during his testimony, and both the Statement in Support and Dr. Roskin described the hours slightly differently than they are described in the Supplemental Statement of Operations that was submitted after the hearing (Ex. 55(g)). Specific items of credible testimony indicate that the Supplemental Statement of Operations is incorrect in stating that the hospital opens at 8:00 a.m. Monday through Thursday – it is undisputed that clients are required to bring animals in for scheduled surgeries between 7:00 and 8:00 a.m., so that hour must be included in the hours of operation. Moreover, Dr. Roskin's specific testimony that the hospital closes at 6:00 on Fridays is credible, considering that shorter hours on the last day of the typical work week are common. There was no specific testimony contradicting the 5:00 p.m. closing time for Saturday set forth in the Supplemental Statement of Operations, so the Hearing Examiner has used the 5:00 p.m. closing time, rather than the 3:00 p.m. closing time listed in the Statement in Support, to avoid understating the intensity of the use.

during the midday period, roughly 10:00 a.m. to 3:00 p.m., when shifts overlap.⁵ He noted that the hospital has more staff than is absolutely necessary during that overlap period, but allowing that overlap is the only way to give employees enough hours for them to earn a living. To keep good workers, Dr. Roskin finds that the hospital has to provide them with enough hours.

Petitioner requests approval for the current appointment schedule, with appointments scheduled at 20- to 30-minute intervals⁶ during the following time periods:

9:00 a.m. to 1:00 p.m., Monday through Saturday
2:00 to 4:00 p.m. Monday and Thursday⁷
1:00 to 3:00 p.m. Tuesday
4:00 to 7:00 p.m. Monday through Thursday
3:00 to 5:00 p.m. Fridays

Compared to the approved appointment schedule, the current appointment schedule provides for shorter appointment hours on Wednesday, longer hours on Monday, Tuesday and Thursday, slightly shorter hours on Friday and no change on Saturday. (The original appointment scheduled provided for seven hours of appointments Monday through Friday, spread out between 9:00 a.m. and 7:00 p.m., and four hours on Saturday. The current schedule provides for nine hours of appointments Monday, Tuesday and Thursday, four hours on Wednesday, six hours on Friday and four hours on Saturday.) The Board's opinion anticipated that only two of the three veterinarians at the hospital would see patients on an appointment schedule. See Opinion at 2. Currently, the hospital has as many as three veterinarians seeing appointments on weekday mornings, one during the midday appointment hours, and two during afternoon/evening hours and on Saturdays.⁸ During the hearing, Dr. Roskin agreed to a condition of approval that would require the hospital to schedule appointments so that no more than six clients are on site for appointments at any one time. See Tr. at 143.

⁵ The Statement in Support, Exhibit 18(a), states that the 18-employee peak is reached only at midday on Tuesday and Thursday, but Dr. Roskin's testimony did not limit it to certain days of the week.

⁶ Per Dr. Roskin's testimony.

⁷ The Statement in Support filed in September, 2005, Exhibit 18(a), included midday appointment hours from 2:00 to 4:00 on Wednesdays. This time slot is not listed on the Supplemental Statement of Operations filed after the hearing, Exhibit 55(g). Lacking clarifying testimony, the Hearing Examiner assumes that the later-filed submission is more accurate.

⁸ This summary is based on the Supplemental Statement of Operations, Ex. 55(g), and on appointment schedules for Tuesday, January 24, 2006 and Thursday, January 26, 2006 that were submitted in support of the transportation expert's findings. See attachments to Exhibit 21(a).

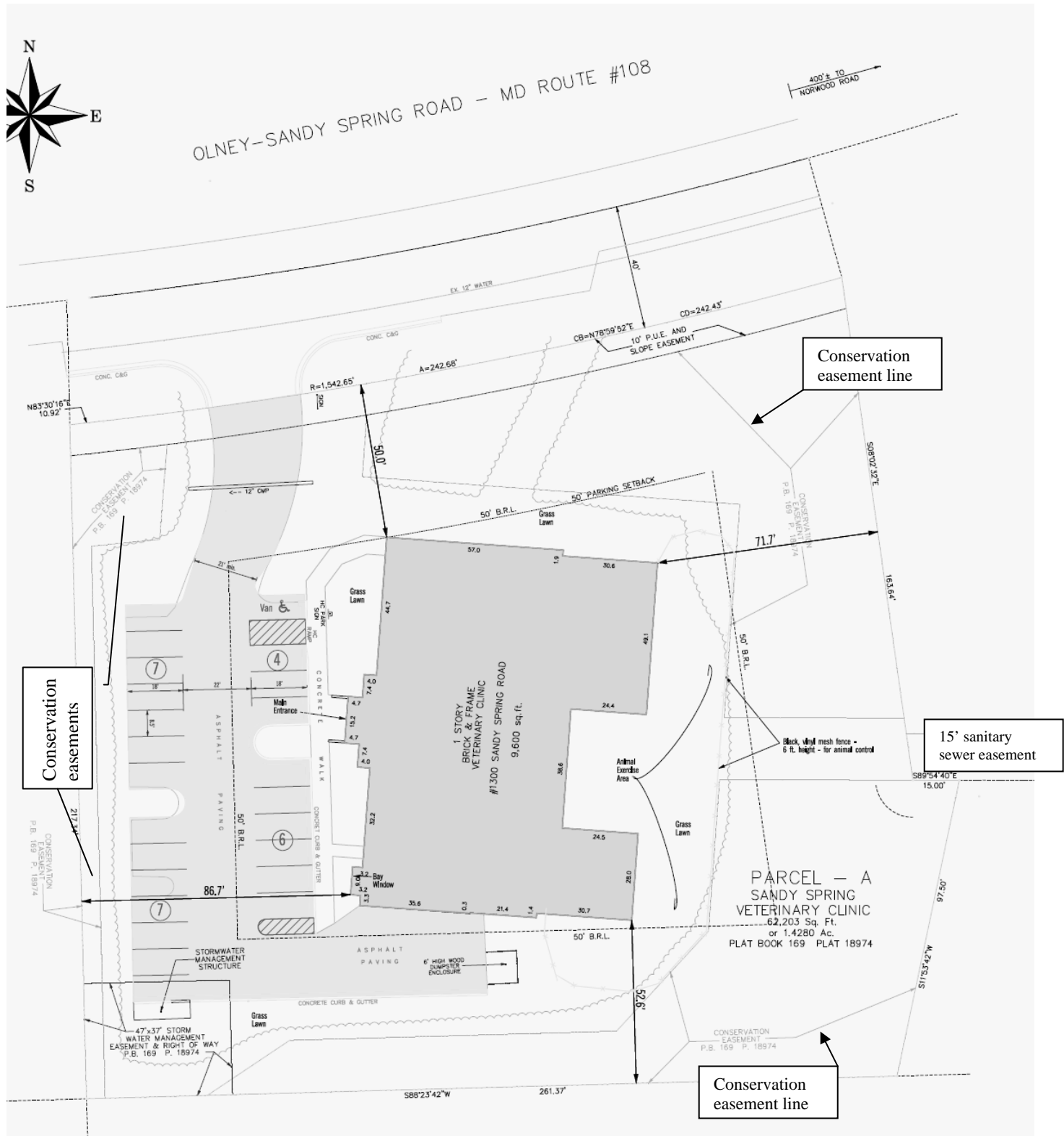
The current Statement of Operations also specifies that patients are dropped off for surgery or diagnostic procedures between 7:00 and 8:00 a.m. Monday through Friday, and that no more than ten employees, including veterinarians, are on site during this time. See Ex. 18(a) at 4.

2. As-Built Condition of Building, Including Bay Window

As noted earlier, the construction of the building did not conform in all its details to either the building elevations or the floor plan that were submitted at the original hearing. Petitioner now seeks approval for the as-built condition of the building, as shown on the site plan and elevations reproduced on the following four pages. The following changes from the original plans have been identified:

- First-floor measuring 9,600 square feet, rather than 9,034 square feet as shown on Exhibit 12(c), or “approximately” 9,000 square feet as stated in the Opinion.
- Second floor eliminated and roof line altered accordingly.
- Bay window added along front building façade to provide sun room for boarding cats.
- Window configurations and sizes changed on both west (front) façade and north (Rte. 108) façade (east and south elevations were not provided in 1992). The as-built condition retains the same number of entrances along the front façade. For comparison purposes, the elevations that were submitted with the original application are reproduced on page 24 and the current elevations are on pages 22 and 23.
- Floor plan reconfigured to occupy changed building footprint. Most functions appear to be roughly the same size on the approved and current floor plans, except the non-medical cat boarding ward, which is roughly twice as large on the current plan as on the approved, although in both cases it occupies a very small percentage of the overall floor plan (about 350 square feet out of 9,600 on the current plan, compared to about 160 square feet out of 9,000 on the original plan).

Site Plan, Ex. 55(b) (graphics only)



Site Plan Notes, from Ex. 55(b)

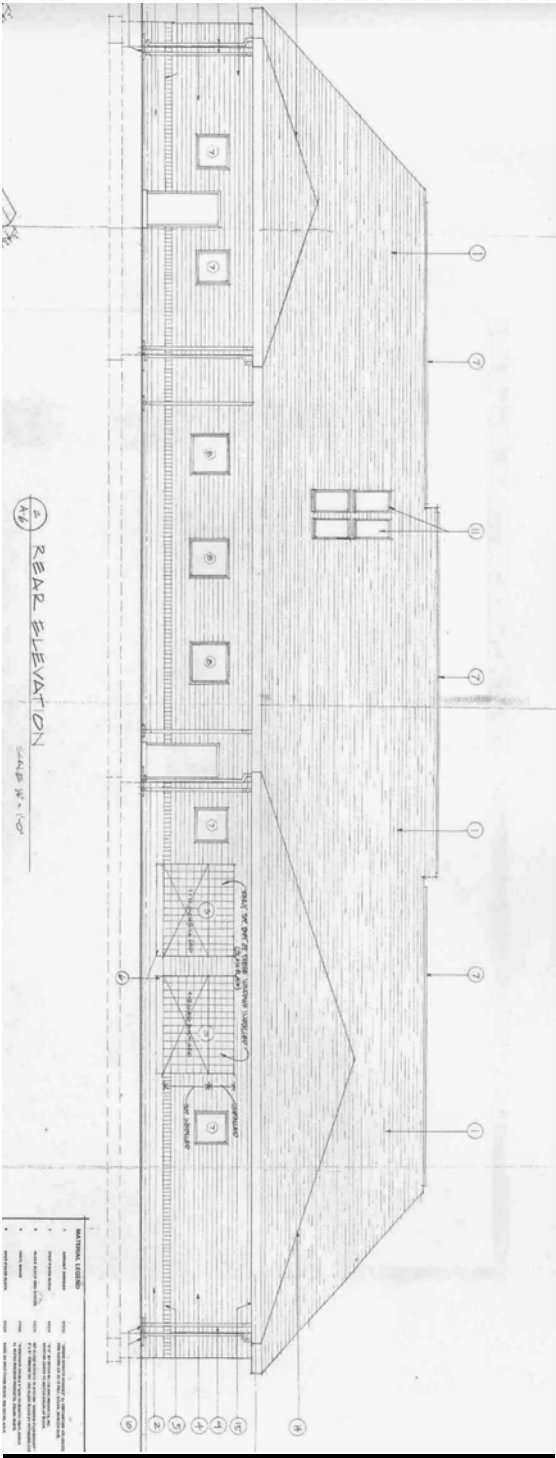
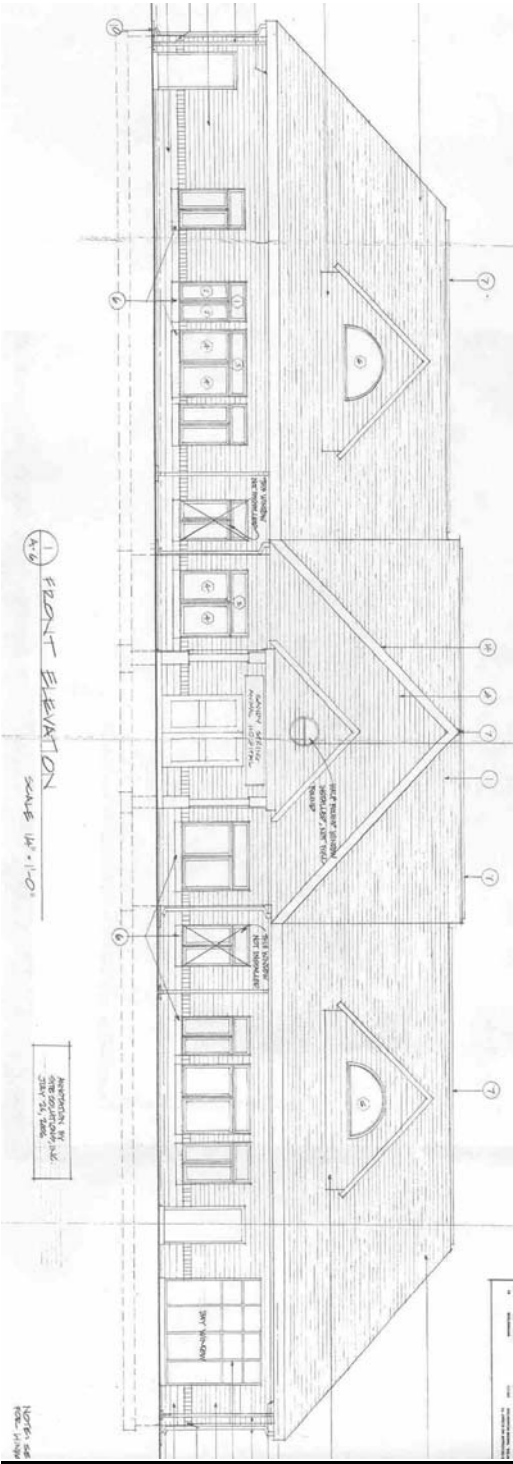
SITE DATA

1. Site Area: 1.428 Acres
2. Legal Description: Plat #18974 / 589-45 (Parcel N458)
3. Zoning: R-200
4. Original Special Exception: S-1904, Approved March 2, 1992
5. Proposed Use: Veterinary Hospital per Montgomery Co. Zoning Sec. 59-G-2.32 (No residential)
6. Minimum Building Setback Required: 50 feet from property boundary
Building Setback Provided: 50 feet
7. Maximum Number of Employees: 25
8. Maximum Number of Doctors at any Time: 4
9. Maximum Number of Employees at any Time: 14
10. Maximum Number of Patients at any Time: 6
11. Number of Parking Spaces Required: 24
11. Number of Parking Spaces Provided: 24
12. This building is connected to public water and sanitary sewer.
13. Size of building: 9,600 sq.ft.

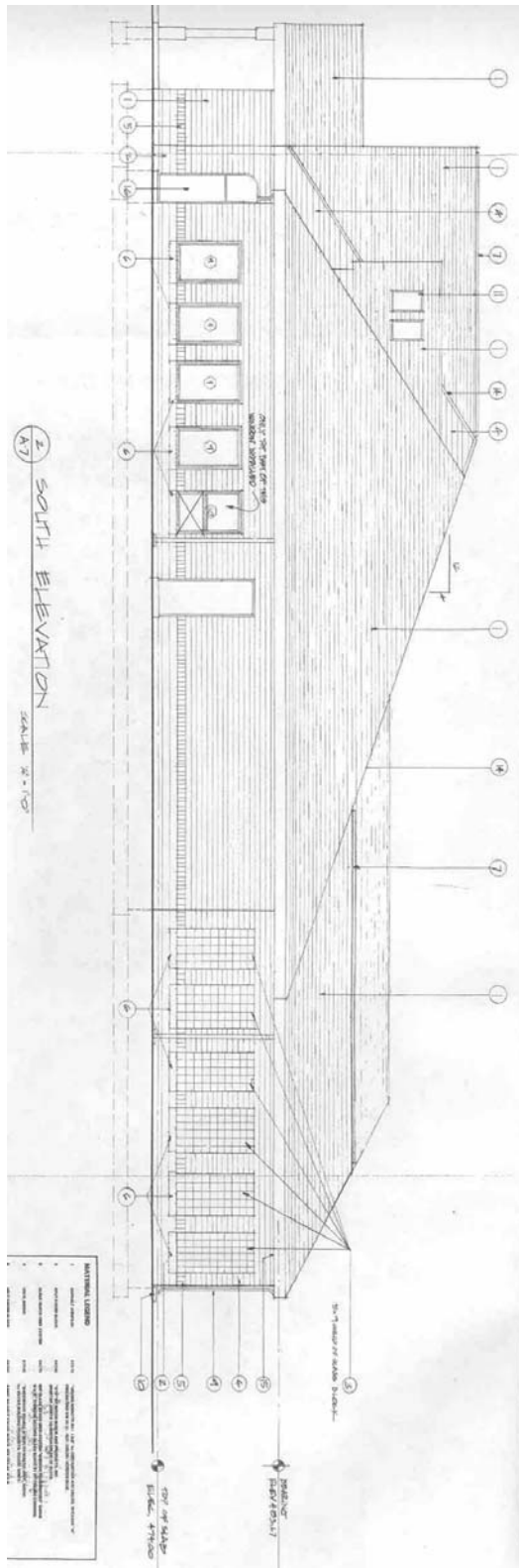
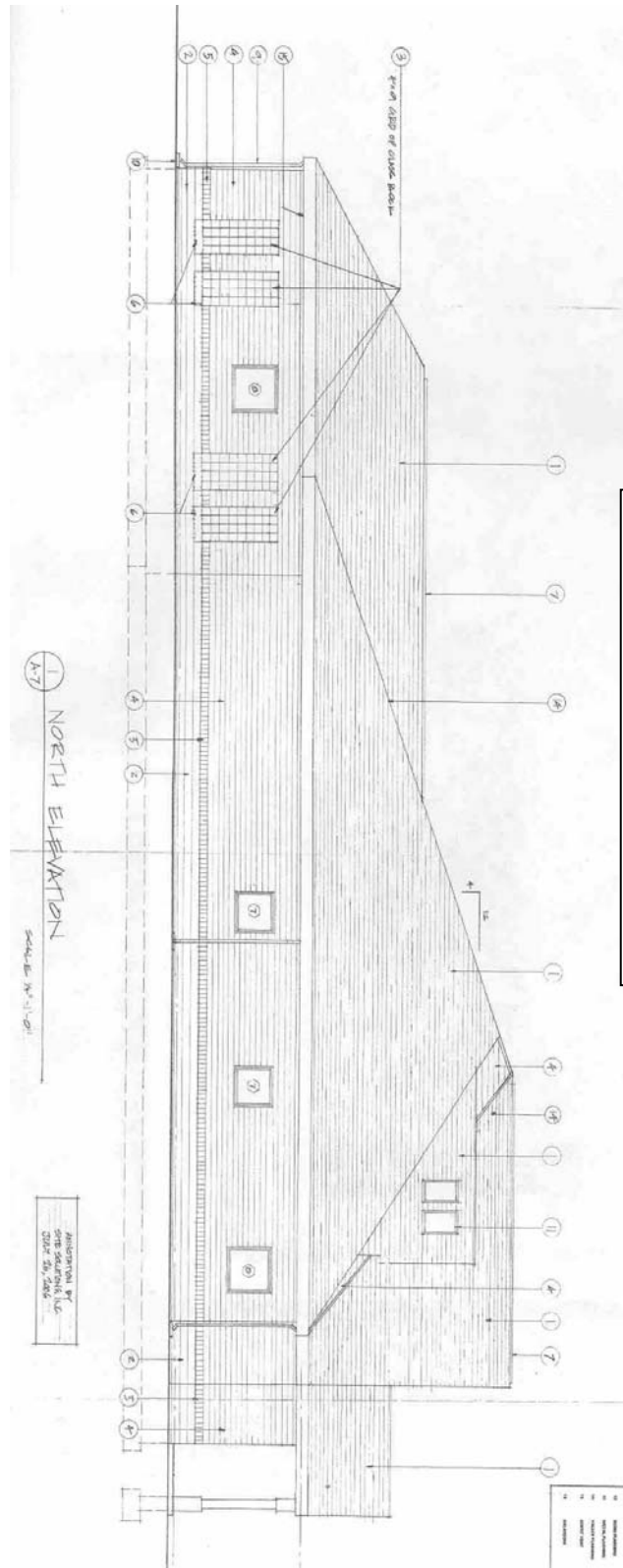
General Notes

Boundary and surface feature information indicated on this drawing are from a property survey prepared by Fowler Associates, Inc., Rockville, Md., dated August, 2005.

As-Built Front and Rear Elevations

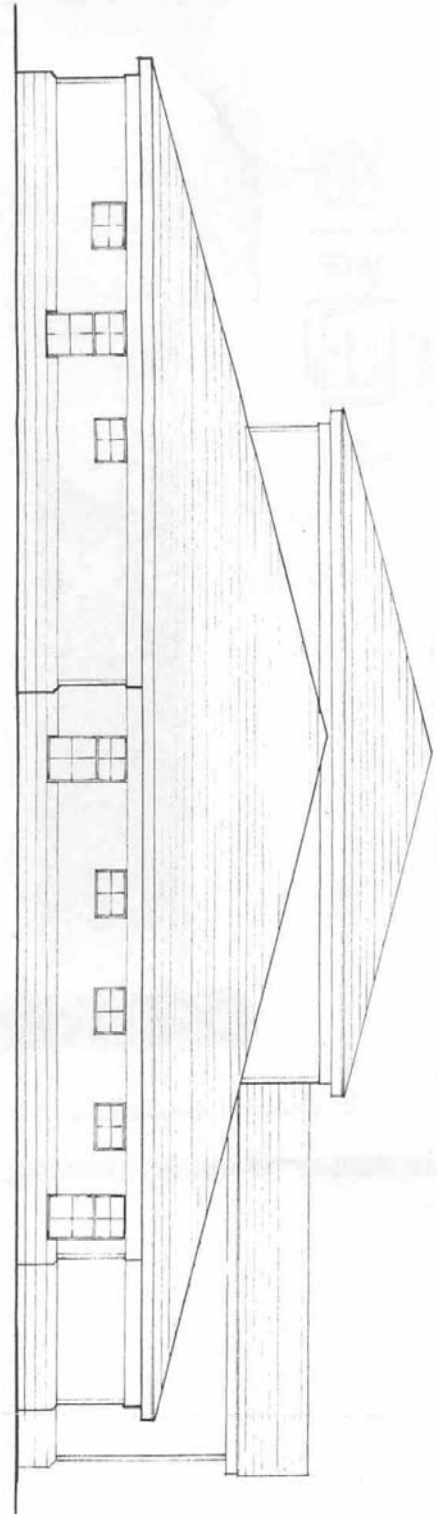


As-Built North and South Elevations

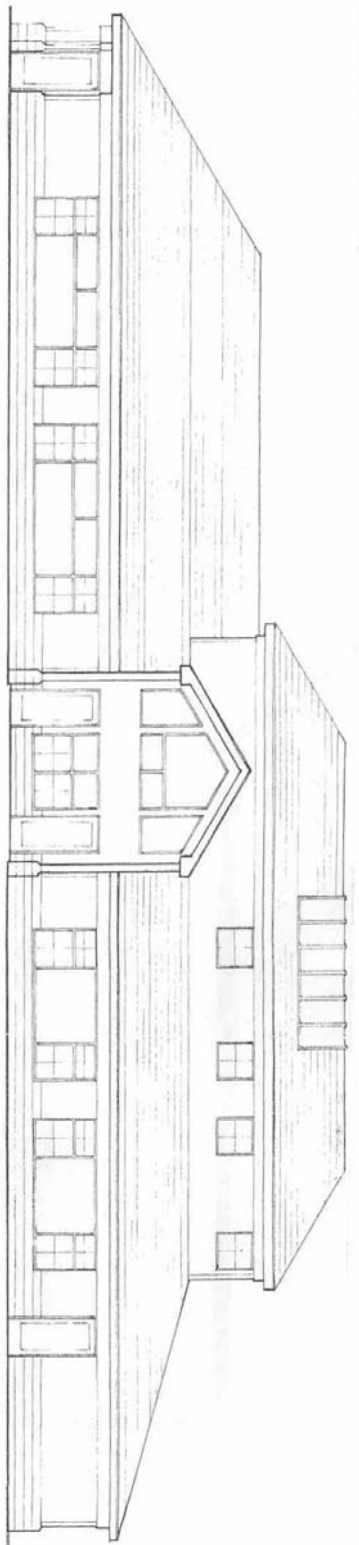


North and Front (West) Elevations Submitted to Board in 1992

SANDY SPRING ROAD ELEVATION



FRONT ELEVATION



3. Parking

The site plan that was approved in the Board's original Opinion in this case, which was identified as Exhibit 12(c), provided for 27 parking spaces. As noted earlier, the conditions of approval specifically required that construction conform to Exhibit 12(c). The conditions of approval also required, however, that development of the site be consistent with a landscaping and lighting plan to be approved by Technical Staff after approval of the special exception. In a demonstration of the practical difficulty of having a landscaping plan approved after a special exception has been granted, the approved landscaping and lighting plan, which lacks an exhibit number but can be found in the original case file with an attached cover memorandum from the MNCPPC, is not consistent with the approved site plan, Exhibit 12(c). The approved landscape and lighting plan depicts the parking that was actually built, which has only 22 spaces. A comparison of the two plans suggests that the parking lot was shortened by one space at the north end to make room for additional landscaping, and that three spaces were removed from within the parking rows to create landscaped islands.

Petitioner now proposes to add two parking spaces, as shown on the site plan on page 20, by (i) removing one landscaped island; and (ii) re-striping to reduce the width of the parking spaces from nine feet, as required at the time of the original approval, to the current width requirement of 8.5 feet. No change in the footprint of the paved area is proposed. Technical Staff states that staff cannot make a finding as to whether the proposed 24 spaces are sufficient without knowing whether, and how much, non-medical animal boarding is permitted. See Staff Report at 2. Staff visited the site on a Tuesday, from about 11:30 a.m. to 12:15 p.m., and observed that the existing 22-space parking lot was completely full at times, plus there were three cars parked on the side of the building, in the dumpster area, where parking is not permitted. Staff notes that during this 45-minute observation period, the parking lot never had more than two legal spots free.

Petitioner retained a traffic consultant to conduct parking occupancy counts for the subject site. The counts were conducted in 10-minute increments from 7:00 to 9:00 a.m. and 4:00 to 6:00 p.m. on Thursday, January 5, 2006 and from 9:00 a.m. to 1:00 p.m. on Thursday, January 26, 2006. See Ex. 21(a). The maximum number of spaces occupied at any one time during these count

periods was 22. See *id.* Accordingly, the traffic consultant, Glenn E. Cook, concluded that the 24 spaces proposed would be more than adequate to handle the parking demand at the site. He stated that the counts were taken on a Thursday because it is the hospital's busiest day (Dr. Roskin described both Tuesday and Thursday as busy days).

Mr. Cook also examined parking sufficiency based on other utilization information. He noted that no more than 18 employees, including veterinarians, would be on site at one time. No more than three doctors would have appointments scheduled on any given day, and they would be set in 20-minute increments. Assuming overlapping appointments for all three doctors, Mr. Cook concluded that a maximum of six spaces would be needed for clients at any one time. Thus, he concluded, 24 spaces would be sufficient.

Hearing testimony indicated that in addition to employees and clients with appointments, there are also visits to the site by people picking up prescription pet foods or medications, as well as people dropping off animals in the morning for surgical procedures and picking them up at the end of the day, people dropping off and picking up animals for non-medical boarding, and deliveries.⁹ Mr. Cook testified that the parking occupancy counts reflect all activity at the site, suggesting that parking is adequate for all needs, not just employees and clients with appointments. He conceded that there was one incident of a 23rd vehicle on site during the parking counts, which was a delivery vehicle. It parked along the side of the building near the dumpster. Tr. at 106.

Dr. Roskin testified that the hospital does not experience a parking shortage with the current number of spaces. He acknowledged that people sometimes park on the side of the building, which becomes a problem only when it is time for the dumpster to be emptied, on Thursdays, and then people have to move their cars. Dr. Roskin stated that there are 18 employees on site only during the midday period, roughly 10:00 a.m. to 3:00 p.m., when shifts overlap. Moreover, during midday appointment hours, only one doctor is seeing appointments, reducing the number of clients vehicles

⁹ The Supplemental Statement of Operations estimates deliveries at one to two per day. See Ex. 55(g) at 6.

likely to be on site at one time from six to two (two overlapping patient arrivals/departures for one doctor, rather than two each for three doctors). He also noted that animals are dropped off for surgical or other procedures early in the morning, between 7:00 and 8:00 a.m., when there are only ten employees on site.

The appointment schedules and staffing information in the Supplemental Statement of Operations indicate that the “midday appointment hours” when only one veterinarian is seeing appointments do not entirely coincide with the overlapping shift period, which Dr. Roskin described as 10:00 a.m. to 3:00 p.m. See attachments to Ex. 21(a); Ex. 55(g). The morning appointment hours, when three veterinarians are seeing patients, are from 9:00 a.m. to 1:00 p.m., occupying three hours of the five-hour period Dr. Roskin described as having a shift overlap. This suggests a high likelihood of 18 employees and six client vehicles on site between 10:00 a.m. and 1:00 p.m.

After the hearing, Petitioner submitted a table showing the number of people who came to the site to pick up medication or food during a three-week period in July 2006. See Ex. 55(g) at 4. Each day was divided into segments of three or four hours to track these numbers: 8 a.m. to 12 noon, 12 noon to 4 pm, and 4 pm to 7 pm. The table shows that the highest number of people coming to the site for food or medication during any four-hour period was 14, between noon and 4 pm on July 3. The largest numbers tended to cluster around the July 4th holiday, which may have affected the timing of people’s trips to the hospital. The average number of people during the three-week period was three between 8 am and noon, six between noon and four pm, and five between 4 pm and 7 pm.

4. Noise Mitigation

The specific conditions for a veterinary hospital special exception include two separate noise regulations, which are quoted below:

59-G-2.32(b)(3). For all buildings in which animals will be present, maximum expected interior sound levels must be reduced to 40 (A-weighted decibels) outside, measured at ten feet from the structure.

59-G-2.32(b)(6). On weekdays, the sound at the nearest receiving property line must not exceed 60 between the hours of 8 a.m. to 6 p.m. and 50 between the hours of 6 p.m. to 8 a.m. On Saturdays, Sundays, and federal holidays, the sound at the nearest receiving property line must not exceed 60 between the

hours of 9 a.m. to 6 p.m. and 50 between 6 p.m. and 9 a.m. Terms are defined in accordance with the Montgomery County Noise Ordinance (Chapter 31B of the Montgomery County Code). In any event, the predicted maximum receiving property line sound levels must not exceed the characteristic ambient sound levels by more than 3 at any time.

Petitioner's first noise study, dated September 12, 2005, analyzed the compliance of the existing use with these standards.¹⁰ This analysis was based on acoustical surveys that were conducted on June 23, 2005 between 10:30 a.m. and 4:00 p.m. and on June 24, 2005 between 12:30 a.m. and 4:30 a.m. – in other words, during the middle of the day and the middle of the night. The dogs that were in the medical and non-medical boarding wards were purposely excited to make them bark. With the dogs excited, noise levels were measured both inside the dog wards and, as required by Section 59-G-2.32(b)(4), at locations ten feet away from the building in the vicinity of the dog wards. Inside the dog wards, average barking noise levels measured 97 in the grooming and non-medical boarding area, and 93 in the ward for dogs under medical care. Ex. 18(h) at 3. Noise levels were measured at 50 to 55 ten feet away from the building, although the acoustic consultant, Gerald H. Henning, found it difficult to measure only the dog barking noise, and believes that background noise (mostly traffic) contributed to the noise levels measured. *Id.* at 4. Mr. Henning also noted that the only outside locations where dog barking was measurable above the background noise were in the vicinity of the dog wards. *Id.* at 3.

Mr. Henning argued that if the intent of the Zoning Ordinance is to prohibit excessive barking noise at surrounding properties, implementation of the 40 noise requirement ten feet from the building is not warranted. The Hearing Examiner informed Petitioner's counsel that Petitioner was free to make that argument to the Board of Appeals, but that the Hearing Examiner would not be able to

¹⁰The report (and its author's testimony) argued that the noise requirements of Section 59-G-2.32 are inconsistent with one another, and that although the 50- and 60- standards are reasonable, the 40- criterion is "very strict and unreasonable." Ex. 18(h) at 2. The Hearing Examiner explained that the Petitioner may seek a change in the Zoning Ordinance if he finds it to be unreasonable, but the Hearing Examiner and the Board of Appeals are obligated to apply each provision of the Zoning Ordinance as written at the time of our review.

Petitioner's counsel argued, in a post-hearing brief, that the Board of Appeals does not have authority to require this use to comply with the current noise regulations. The Hearing Examiner's analysis of why the present modification petition cannot be approved unless the use comes into compliance with current noise standards for a veterinary hospital special exception is provided in Part IV below.

recommend approval of the modification when the only evidence concerning noise levels established that the use, as modified, would not conform to the current requirements of the Zoning Ordinance. After a recess, Petitioner's counsel requested that the record be held open to allow his client to consider noise reduction measures. Petitioner ultimately proposed the noise reduction measures summarized below, which are described in more detail in a July 31, 2006 report from Mr. Henning, Exhibit 55(a):

Non-Medical Dog Boarding Ward

1. Remove existing acoustical tile ceiling. At the two terminations of ductwork associated with a rooftop exhaust fan, replace five feet of existing duct with two-inch soundlined sheet metal duct.

2. Install a suspended, isolated gypsum board ceiling, with acoustical tile ceiling suspended at least six inches below. If loss of ceiling height from suspended tile ceiling cannot be tolerated, options for surface mounted sound absorptive materials will be provided, to be used with an additional layer of gypsum board for the ceiling.

3. Install metal studs in the exterior walls and acrylic plastic on the studs from the floor to the gypsum board ceiling. Seal all joints with silicone caulk. May substitute gypsum board for acrylic plastic on wall with exterior door, in which case windows may be installed at existing locations and sizes, with ¼ inch laminated safety glass.

4. In new metal stud wall system, install a new solid wood core (or comparable weight) door system with seals, resulting in two door systems in tandem, one swinging out and one in. Door seals and panel materials specified.

5. Re-install dog compartments with minimum two-inch air space between translucent back panels of compartments and new acrylic plastic walls.

Medical Dog Ward

1. Remove existing acoustical tile ceiling. From two air inlets associated with rooftop exhaust fan, replace five feet of the duct with two-inch, soundlined sheet metal duct.

2. Install a suspended, isolated gypsum board ceiling, with acoustical tile ceiling suspended at least six inches below. If loss of ceiling height from suspended tile ceiling cannot be tolerated, options for surface mounted sound absorptive materials will be provided, to be used with an additional layer of gypsum board for the ceiling.

3. Install metal studs in exterior walls (except exterior wall with cabinets). Install 3 ½ inch fiberglass batt insulation between studs and one layer of water-resistant, 5/8 inch gypsum board on studs for wall finish.

4. Existing windows on new gypsum board walls may be replaced at same size and location, with ¼ inch laminated safety glass.

5. In new metal stud wall system, install a new solid wood core (or comparable weight) door system with seals, resulting in two door systems in tandem, one swinging out and one in. Door seals and panel materials specified.

6. Re-install dog compartments with minimum four-inch air space between back panels of compartments and new gypsum board walls.

At Technical Staff's request, the noise reduction effect of the above measures was analyzed in a third report from Mr. Henning, dated September 28, 2006. See Ex. 58(a). The report noted that because the level of noise ten feet from the building was measured between 50 and 55 , the goal of the noise reduction measures was a 15- reduction in noise. The report provides the acoustical performance of all of the recommended building components in terms of the Sound Transmission Class (STC) rating, and compares these with the existing construction of the dog wards. Finally, the report concludes that with the recommended noise reduction measures, exterior noise would decrease by at least 15 from current levels, bringing the hospital into compliance with the 40 standard.

Environmental Planning Staff at the MNCPPC reviewed Mr. Henning's reports and provided a brief analysis. Staff noted that the Montgomery County Zoning Ordinance has long required veterinary buildings to be "soundproofed," and described the fairly recent addition of a 40- standard as spelling out what is considered soundproofed. See Ex. 63. Staff observes that a level of 40 is low for

outdoor noise, and would generally be difficult to hear because other outdoor noise levels, such as roadway traffic, are typically higher. The Hearing Examiner notes that the original Opinion approving the subject special exception stated that the building was to be constructed of brick and wood “and completely soundproofed.” Opinion at 2.

Technical Staff notes that the proposed noise reduction measures would increase the STC rating of the building from 37 to 53, which supports a finding of compliance with the acoustical noise standards specified in the Zoning Ordinance. Staff recommends that the special exception be conditioned on compliance with the specifications in these reports, including that the acoustical consultant provide written approval for any changes that may be desired for cost or availability reasons, to assure equivalent acoustical performance. See Ex. 63 at 1. Staff notes that the recommendation for double doors in tandem may be contrary to fire code requirements. Staff suggests that if the fire code prevents the use of double doors as proposed, equivalent noise reduction can be provided by replacing the current doors with an acoustical door having a laboratory rating of at least 45 STC, or adding other reduction measures that result in comparable acoustical performance for the door system.

5. Other Site Changes: Fencing and Signage

Following an unfortunate incident in which a dog escaped from the site and was hit by a car, the hospital fenced in the area at the rear of the building, where dogs are walked. The fencing is a vinyl mesh material, six feet tall, that is typically used as a tennis court divider. Dr. Roskin explained that it comes in sections, about 60 feet long, and the hospital has three strung together. As shown on the final site plan, it extends from the northeast corner of the building (the Rte. 108 side), around the back and southeast corner of the building to a point about 27 feet up along the southern façade. The fencing runs partially into the woods behind the house, allowing dog walkers to walk the animals in the grassy area behind the building and a little bit into the woods, but preventing dogs from escaping the property. Petitioner seeks approval to maintain this fencing in place. As noted earlier, the specific conditions for the use require that outside areas used to walk or exercise animals be fenced for the safety of the animals. See Section 59-G-2.32(b)(2).

The original special exception approval did not mention signage. The hospital has a sign, however, which is posted at the front edge of the driveway. The sign, shown in the photograph below, was approved by the Sign Review Board on January 13, 1995 as a double-faced, freestanding sign, sited immediately behind the front lot line, four feet by three feet in size, with a two foot by eight inch panel below the sign. See Ex. 55(h). As may be seen in the photograph below and on the landscape plan, which also serves as a lighting plan, the sign is lit by two small floodlights pointing up at the sign. The Supplemental Statement of Operations, Exhibit 55(g), indicates that the sign illumination is on a timer system and will go off no later than 9:00 p.m. Petitioners seek approval to keep the existing sign.

Existing Sign, Ex. 43



E. Non-medical Animal Boarding

Keeping animals overnight for medical reasons, such as recovery from surgery or a need for medical observation, is a normal part of any veterinary hospital. Boarding animals for non-medical reasons, such as pet owners going out of town, is – and was, at the time this special exception was

approved – defined in the Zoning Ordinance as a separate use. As noted earlier, the only mention of non-medical animal boarding in the BOA's Opinion in this matter is the following statement:

Dr. Roskin testified that he would occasionally board animals for his regular clients. He stated that there would be no runs or other facilities outside for the boarding of animals and that any boarding would be purely incidental to the activities of the hospital.

Dr. Roskin conceded during the hearing that, as Technical Staff discovered, the hospital has not always hewed to the promise that boarding would be provided only for "regular clients." According to the Staff Report (which Dr. Roskin did not dispute), at the time of Staff's inquiries, the hospital was routinely providing boarding services to anyone requesting them, without regard to whether the animals in question were regular clients. There is no evidence in the record to indicate whether the hospital has always accepted animals for boarding without checking whether they were regular clients, or whether this was a relatively recent practice. There is also no evidence indicating whether this was a regular practice or only happened, as Petitioner's counsel suggested in a written submission, "from time to time." See Ex. 55(g) at 5, n.1.

The Petitioner has provided the following information about the hospital's non-medical boarding services:

- There are 36 cages in the non-medical boarding ward for dogs, although the Petitioners have offered to reduce this number to 26 by removing or permanently disabling ten cages (see Ex. 55(g) at 5);
- because cages are designed for dogs of different sizes, the actual number of boarded animals will always be significantly less than the number of cages;
- there are 39 cages in the non-medical boarding ward for cats (see Ex. 44 and Roskin testimony);
- depending on seasonal demand, boarding has historically ranged from four percent to 49 percent of capacity (see Ex. 55(g) at 5);
- from 2003 to 2005, boarding income accounted for approximately seven percent of the hospital's total income;

- the number of transactions related to boarding activity averaged 6.5% of the total number of hospital transactions generated from 2003 to 2005 – in 2003 there were 1,216 boarding transactions and 17,633 hospital transactions, in 2004 there were 1,282 boarding transactions and 18,337 hospital transactions, and in 2005 there were 1,166 boarding transactions and 19,273 hospital transactions; and
- the non-medical boarding facilities occupy what Petitioner considers a “modest portion” of the gross floor area of the hospital building.

The Hearing Examiner scaled off the non-medical boarding wards on the submitted floor plan and found that the dog ward occupies approximately 675 square feet of space, and the cat ward approximately 160 square feet. See Ex. 55(c). In a facility as large as this hospital, with 9,600 square feet of space, these square footages are, indeed, modest. Taken together, however, the non-medical boarding wards occupy roughly 9 percent of the building's square footage, which is not inconsequential. Moreover, a visual review of the floor plan suggests that the non-medical boarding wards occupy more than twice as much space as the medical boarding wards.

The Petitioner submitted three charts detailing the monthly occupancy of the non-medical boarding wards during 1997, 2000 and a 12-month period spanning May 2005 to April 2006. See Exs. 44-46. The data in these charts is summarized in the table below. It shows a significant increase in the number of animals boarded between 1997, two years after the hospital opened, and the 2005-2006 year. The highest number of dogs boarded in any month in 1997 was 27, and fewer than 20 dogs were boarded in every month except August. In the 2005-2006 year, the *lowest* number of dogs boarded in any month was 33, the highest was 68, and there were six months with more than 60 boarding dogs. The increased boarding activity can also be seen in the percentage of capacity used. During 1997, the percentage of the dog boarding capacity used ranged from 0% to 16%, and was at 8% or lower in every month except August. In the 2005-2006 year, the percentage of dog boarding capacity used ranged from 16% to 49%, and was at 30% or greater for seven months of the year (all the spring and summer months, plus November). Dr. Roskin acknowledged that there has been an

increase in the number of animals boarded, but explained that this is due to the increase in the number of patients at the hospital. As the hospital has grown, boarding activity has naturally grown with it. As noted earlier, no information is available as to how many of the animals boarded in any given period were regular clients and how many were not.

Historical Summary of Non-Medical Boarding Activity

	Jan	Feb	March	April	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.
1997												
# dogs boarded	1	9	4	7	11	9	12	27	8	12	19	13
percent capacity used ¹¹	0%	3%	2%	3%	4%	6%	6%	16%	4%	8%	8%	6%
# cats boarded	0	2	3	1	1	1	5	8	0	2	4	4
percent capacity used	0%	3%	2%	3%	4%	6%	6%	16%	4%	8%	8%	6%
2000												
# dogs boarded	26	17	23	34	20	28	38	22	6	15	26	36
percent capacity used	30%	24%	30%	34%	8%	15%	27%	41%	5%	19%	17%	33%
# cats boarded	4	3	5	12	2	12	11	14	4	2	11	12
percent capacity used	30%	24%	30%	34%	8%	15%	27%	41%	5%	19%	17%	33%
May-Dec. 2005 and Jan.- April 2006												
# dogs boarded	44	44	49	65	64	66	67	68	51	52	62	33
percent capacity used	23%	16%	27%	31%	30%	34%	43%	49%	36%	23%	36%	20%
# cats boarded	16	14	24	21	13	14	30	44	9	13	17	17
percent capacity used	17%	13%	14%	11%	8%	13%	22%	32%	4%	8%	8%	10%

¹¹ "Percent capacity used" means the number of "compartment days" that were occupied, divided by the total number of "compartment days" available in that month (the number of compartments multiplied by the number of days in each month). For example, in January 2006,

F. Landscaping and Lighting

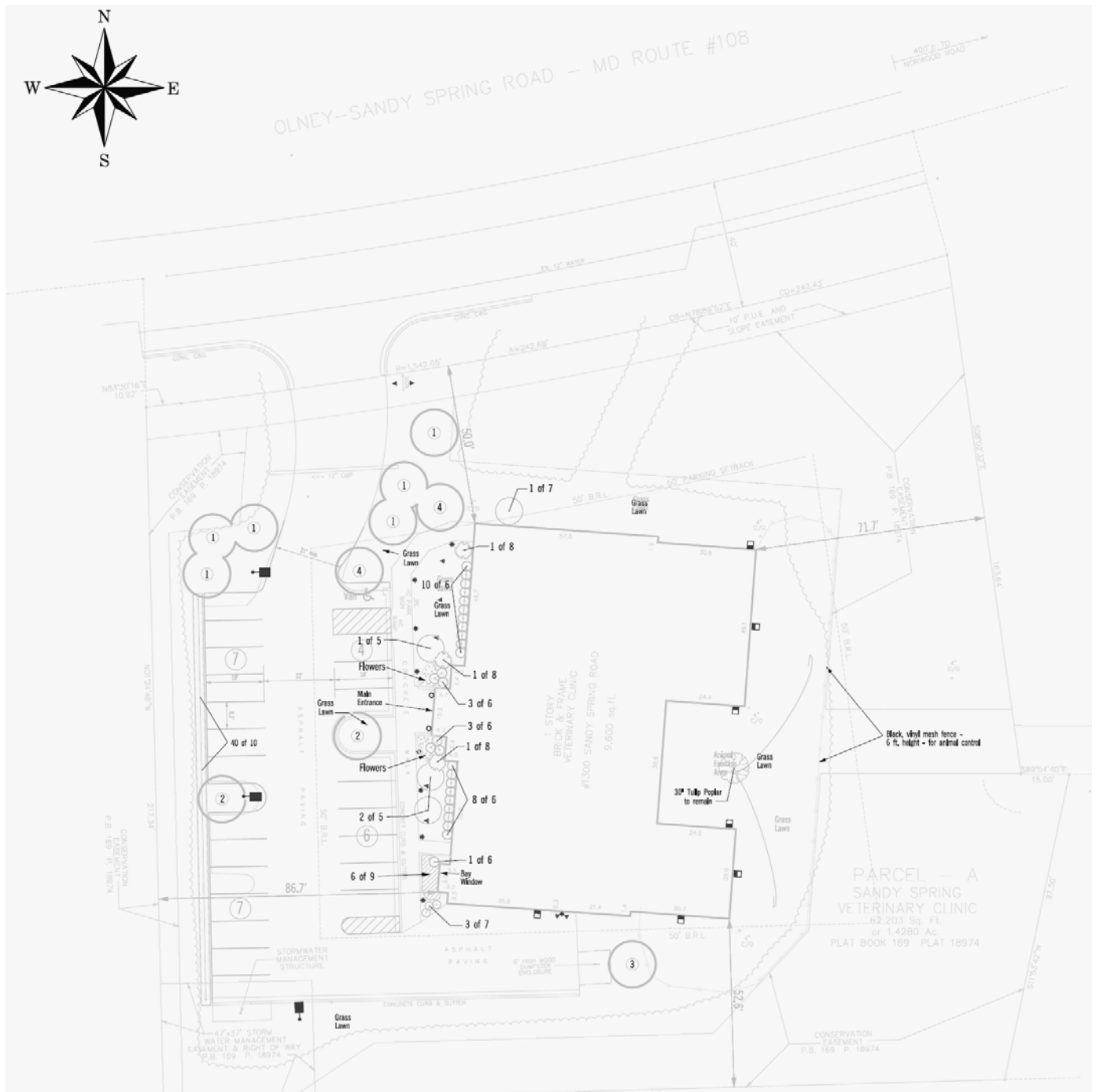
The only change Petitioner proposes to make the site landscaping is the removal of one landscape island in the parking lot. As noted earlier, minor additional planting that was needed to comply with the approved landscaping plan has been installed. No changes to exterior lighting are proposed. Existing lighting consists of three pole lights in the parking lot on 15-foot poles, eight 42-inch-high bollard lights on the walkways, five ground-mounted, box-enclosed spot lights that illuminate the front façade, two ground-mounted spot lights that illuminate the sign, two residential-type lighting fixtures over the entrance, seven box-enclosed security lights mounted on the sides and rear of the building and one double-floodlight motion detector light on the south side of the building, near the dumpster. The Supplemental Statement of Operations, Ex. 55(g), states that with the exception of the light near the dumpster, all of the exterior lights are on a timer that turns them on at dark and turns them off by 9:00 p.m. The light near the dumpster operates by motion detector. The landscape plan, which also depicts exterior lighting, is reproduced below and on the next two pages (graphics are on p.37).

Landscape Plan: Plant List, from, Ex. 55(f)

PLANT LIST (Note: All plants are existing. No additional planting is proposed.)







Key #	Botanical Name	Common Name	Quantity (Approximate)
1	Acer rubrum	Red Maple	6
2	Acer saccharum	Sugar Maple	2
3	Prunus spp.	Cherry spp.	1
4	Ulmus spp.	Elm spp.	2
5	Cornus florida	Flowering Dogwood	3
6	Azalea spp.	Azalea	25
7	Ilex spp.	Holly spp.	4
8	Taxus spp.	Yew spp.	3
9	Juniperus horizontalis 'Wiltoni'	Blue Rug Juniper	6
10	Euonymus sieboldiana	Siebold Euonymus	40

Landscape Plan Graphics, from Ex. 55(f)



Landscape Plan: Light Fixture Key, from Ex. 55(f)

Key to Existing Light Fixtures

Symbol	Light Type	Quantity
	"Shoebox" type single fixture on 15' height pole	3
	Square, 42" height bollard light	8
	Floodlight, box enclosed, aimed at front building facade & sign	7
	Cylinder shaped (downward cast) residential doorway fixtures	2
	Box enclosed security lights	7
	Motion detector type double floodlight	1

G. Traffic

The Petitioner's traffic consultant, Mr. Cook, collected data on the volume of traffic in and out of the subject site on Thursday, January 5, 2006 from 7:00 to 9:00 a.m. and from 4:00 to 6:00 p.m.¹² Based on these counts, the highest volume during a one-hour period was nine inbound trips and two outbound trips during the morning peak hour, and five inbound trips and eleven outbound trips during the evening peak hour. Thus, the totals were 11 during the morning peak hour and 16 during the evening peak hour, well below the 30-trip threshold that triggers a study under Local Area Transportation Review ("LATR") requirements. Given that these numbers include the number of employees for which Petitioner currently seeks approval, Mr. Cook concluded that the proposed modification would have no significant impact on adjacent roadways.

¹² These time frames are shorter than the three-hour peak periods that are normally studied in performing LATR. Technical Staff appears to have accepted these counts, however, as sufficient to establish that due to the small number of trips generated, an LATR study is not required for the present modification.

Transportation Planning Staff at the MNCPPC initially recommended approval of the proposed modification with a condition limiting the use to a total of 25 employees, with no more than 18 on site at one time. See Transportation Planning Memorandum dated March 3, 2006, attached to Staff Report. Later, Transportation Staff learned during a meeting with the Petitioner that “the petitioner’s operations include some boarding activities unrelated to the veterinary hospital and that these activities occur outside the Local Area Transportation Review weekday peak periods and therefore would not change the traffic statements submitted by the petitioner.” See Transportation Staff Memorandum dated May 26, 2006. Based on this information, Transportation Staff recommended, as a condition of approval, that all non-medical animal boarding drop-off and pick-up activities be required to occur outside of the time periods from 6:15 to 9:45 a.m. and 3:45 to 7:15 p.m. on weekdays. See *id.* (The specified periods start 15 minutes before the LATR peak periods and end 15 minutes after).

Dr. Roskin testified that the morning limitation is not a problem, because the hospital already has a policy of not allowing non-medical boarding pick-ups and drop-offs before 10:00 a.m. Tr. at 215. In the evening, boarding drop-offs and pick-ups are required to take place no later than an hour and a half before closing, which means 4:30 on Friday, and 5:30 Monday through Thursday. *Id.* Dr. Roskin suggested that while clients do comply with the 10:00 a.m. rule, it would be difficult to also prohibit them from picking up their pets any time after 3:45. When people get home from vacation, he finds, the first thing they want to do is pick up their pet. Dr. Roskin would consider 5:00 p.m. a more realistic cut-off time.

The Hearing Examiner finds that based on the totality of the evidence, it is not accurate to describe the non-medical boarding activities as “unrelated to the veterinary hospital.” They take place in the same building, and the animals are supposed to be regular hospital clients. Mr. Cook’s morning traffic counts would not have picked up boarding activity, which the hospital prohibits before 10:00 a.m., but that activity would have been included in his afternoon counts. Thus, it is not clear why Transportation Planning Staff considered trips related to non-medical boarding to be separate from and in addition to the actual counts that were taken at the site.

H. Environment

Environmental Planning Staff at the MNCPPC states that if no forest disturbance is required in connection with the proposed modification, it is not subject to the County's forest conservation regulations. See Environmental Planning Memorandum of May 24, 2006, attached to Staff Report. Similarly, because the proposed modification does not involve any additional building or parking area, a new stormwater management plan is not required. See *id.*

I. Community Support.

The record contains no indications of opposition to the proposed modification or complaints about the existing operation. Two of the three abutting property owners have submitted letters in support of the modification. James K. Ligon, who owns the vacant land abutting the subject site to the east and the large tract confronting across Rte. 108, supports the requested modification and notes that he has no complaints about the level of noise arising from the operations of the hospital. See Ex. 31. Dr. Hattie N. Washington, who resides on the L-shaped tract that abuts the subject site to the east and south, voices her support for the proposed modification and also states that she has no complaints about noise emanating from the hospital. See Ex. 32. The Hearing Examiner notes that Dr. Washington's home is the closest residence to the subject site.

III. SUMMARY OF HEARING

A. Applicant's Case in Chief

1. Norman Roskin, DVM, Tr. at 13-20; 57-99, 117-158, 215-219

During preliminary questioning by the Hearing Examiner to help determine the proper scope of the hearing, Dr. Roskin described the origins of the animal hospital, which was the result of a merger between his practice, in Sandy Spring, and the practice of a Dr. Deichmann, in Olney. At that time, the two veterinarians probably had about 2,500 patients between them. They presented testimony to the Board and built the current facility based on their estimate of what was needed, and were not aware of the limitations of a special exception. Dr. Roskin did not foresee the growth that the

practice has experienced. Construction on the facility began in 1993 and they opened for business in July 1995. Since then, they have seen a significant expansion in their practice. Dr. Roskin attributes this to several factors: (i) the facility is modern and very attractive; (ii) the vets provide excellent care; and (iii) the population in the areas they serve, Olney, Sandy Spring, Ashton and parts of Rockville and Silver Spring, has grown a great deal.

Dr. Roskin testified that the animal hospital had three veterinarians for the first three to five years. They added a part-time veterinarian, Dr. Hoffman, in about 2001. About the start of 2005, they hired another veterinarian, Dr. Baber, in part because Dr. Jarbo, one of the three original veterinarians, had decided to leave the practice. Shortly after that, Dr. Baber announced that she was pregnant and would need to take maternity leave. That brought about the addition of a fifth veterinarian, Dr. Gregory. Dr. Jarbo has since left, Dr. Baber has come back on a part-time basis, and Dr. Gregory is working pretty much full time. Dr. Roskin has cut down to about half time, leaving the animal hospital with three full-time veterinarians and two half-time.

With regard to other staff, Dr. Roskin stated that it is difficult to hire and retain quality people. To provide care for the increasing patient load, they have found they need to offer full-time positions, which means that some staff arrive early in the morning and some mid-morning, resulting in an overlap period between about 10:00 and 3:00 when they have "extra people." Dr. Roskin stressed that this is the only way the animal hospital can provide the staff with enough hours to make a living. He noted that the maximum number of staff and veterinarians on site never exceeds 18, even during the peak hours, and it is lower after 3:00, when three to six staff members leave, although there are also evening staff members who arrive between 3:00 and 4:00 and stay until 7:00 p.m.

Dr. Roskin stated that boarding is a very incidental part of the practice, so he believes growth in the hospital part of the practice has fueled the increase in staff. He maintained that he and his colleagues told the Board in 1992 that they would like to have (non-medical) boarding as an incidental part of the practice, that was approved, and basically nothing has changed. Dr. Roskin noted

that the highest capacity they've ever filled in their boarding facility was 49 percent, and that boarding accounts for only about five percent of annual revenues. Tr. at 20-21.

On direct examination by his counsel, Dr. Roskin described his own background as a veterinarian with 31 years' experience. He is a co-owner of the animal hospital and was its only representative to testify before the Board at the 1992 hearing. Dr. Roskin stated that the animal hospital provides medical and surgical services to small animals, as well as some grooming and incidental boarding.

Reviewing the hours of operations set forth on the statement of operations that was submitted with the original special exception application, Dr. Roskin stated that it accurately reflected the plans for the animal hospital, which opened its door with those hours. Dr. Roskin testified that the animal hospital also opened with the number of employees described in testimony to the Board, although he did not recall the exact number until reminded by counsel that it was 12. Dr. Roskin then stated that the original staff consisted of three veterinarians, two or three receptionists, two technicians, two kennel staff and two groomers. He noted that in his testimony before the Board, he included non-medical animal boarding in his description of the proposed operation. Tr. at 60-61.

With his recollection refreshed once more by counsel, Dr. Roskin confirmed that a subdivision of the property was approved after the special exception was granted. The subdivision involved a dedication to the State Highway Administration to widen Rte 108, which slightly reduced the size of the lot. Tr. at 62.

Dr. Roskin testified that when the project was approved in 1992 it was supposed to have 22 parking spaces, and it still does. He noted that the approved plans called for an apartment on a second story, above the hospital, but that plan was abandoned for cost reasons. In fact, the second floor space was never improved. The square footage of the building was approved by the Board as 10,500 square feet, with 9,000 on the first floor and 1,500 on the second. Dr. Roskin estimated that the building as constructed has about 9,500 square feet on the first floor. He stated that he was not aware,

when the floor plan of the building was revised, that he was supposed to go back to the Board for a modification of the special exception.

Turning to a description of the neighborhood, Dr. Roskin stated that directly behind the subject site, in the northeast corner of Rte 108 and Norwood Road is part of the Legan property. The next closest neighbor is an adjoining residence located on Norwood Road, which he believes is owned by Dr. Hattie Washington. Directly across the street is more property owned by the Legans. Immediately to the west is a thin parcel of land that belongs to an organization called "The Odd Fellows," which Dr. Roskin has never seen in use. Adjacent to that parcel is the Sharp Street Church.

Dr. Roskin identified a series of photographs showing various elements of the animal hospital. Tr. at 67-69. He pointed out the location of the non-medical boarding facilities on a current floor plan of the building, noting that there are separate facilities for dogs and cats in both the medical and non-medical boarding wards.

Dr. Roskin acknowledged that the present modification petition came about because of the NOV issued by DPS in December 2002. The NOV cited the animal hospital for having too many staff members, a shed on the premises, two or three missing shrubs and a glass bay-front window that was not shown on the plans. This window, Dr. Roskin explained, is part of the non-medical cat boarding area, to give them a place to sun themselves. Dr. Roskin stated that the missing shrubs have been replaced and the shed, which is used for document storage, is going to be removed. The Petitioner had already retained a contractor to remove the shed and begun emptying the contents. Dr. Roskin stipulated that the shed would be removed within 15 days of the hearing, and the revised site plan submitted after the hearing showed that the shed was gone.

Referring to the submitted site plan, Dr. Roskin pointed out that the building faces Rte. 108, and its main direction is east-west. He identified a grassy area behind the hospital, on the west side of the building, as the area where animals are walked. He noted that this area was identified for outdoor walking during the original Board hearing on the special exception, and is enclosed by screens that are normally used to divide tennis courts (identified on the site plan as "vinyl netting, 6 feet high").

The screens, which are temporary, moveable structures, were put in place in about 2004, after a dog escaped and was killed by a car on Rte. 108. In addition, the hospital is nearly surrounded by woods, and there is a wooded area between the outdoor exercise area and the closest neighboring properties. The vinyl netting runs through the woods behind the building, and is visible only on the north and south sides of the building. Tr. at 77. Dr. Roskin affirmed that animals are not walked or exercised off-site, nor are they walked before 8:00 a.m., generally speaking. He stated that dogs might sometimes be walked shortly after 7 p.m. Each staff walks only one dog at a time, he added, and there might be two dogs walked at the same time by two staff members. All solid waste is picked up.

The Hearing Examiner pointed out that approval of the requested modifications would require the animal hospital to meet current standards under Section 59-G-2.32, which include a stipulation that no animal may be outdoors between 6:00 p.m. and 8:00 a.m. In response, Dr. Roskin stated that the hospital would agree to limit dog-walking in accordance with that stipulation in the future. Tr. at 81.

Dr. Roskin noted that although several modifications of the special exception are being requested, no actual changes are proposed in the current operations of the hospital, nor are any changes proposed to the footprint of the parking area, or to the interior or exterior of the building except as necessary to comply with noise regulations.

Dr. Roskin reiterated on direct that he requests approval for up to 18 employees on site at one time because that is the peak number they have when two shifts overlap, from about 10:00 a.m. to 3:00 p.m.. He does not anticipate any need to go beyond that number on site at one time. Reviewing a scheduling chart, Dr. Roskin explained that on Monday the hospital has appointment hours from 9:00 a.m. to 1:00 p.m., and there are three doctors on site with 14 staff members. On Tuesday and Thursday there are four doctors on site, but only three are taking appointments; each doctor has a surgery day when he or she is in the treatment area doing various procedures, and is not seeing patients in the front of the hospital. Thus, Monday through Friday there are three doctors seeing

appointments. On Saturday there are two doctors on site, hours are 9:00 a.m. to 1:00 p.m., and that is the day with the lowest number of staff on site. Tr. at 83.

Dr. Roskin described the scheduling of appointments, which are set up for 30-minute periods every 20 minutes. He noted that the hospital tries to stagger appointment times for the various doctors, to reduce the number of clients on site at one time. Even so, he stated that the hospital needs enough parking spaces to provide for three clients on site at one time, plus three others who may arrive before the previous round of appointments has left. Dr. Roskin stated that the existing parking lot has provided enough room for overlapping clients as well as people coming in for reasons other than an appointment, such as picking up medications or prescription food. The Hearing Examiner asked Dr. Roskin to clarify how the parking works if there are 18 staff members on site and six patients, with a total of 22 parking spaces. Dr. Roskin replied that one or two of the employees carpool, and that there is an area on the south side of the building that is not designated for parking, but is sometimes used for parking. That becomes a problem only when the trash is picked up, on Thursdays. He added that it does not often happen that someone comes to pick up food or medicine where there are already 18 staff members and six patient cars on site, but he has seen people wait in the entrance until someone pulls out. With the additional two parking spaces requested as part of the modification, Dr. Roskin is confident that parking would be sufficient.

Turning to the hours of operation, Dr. Roskin stated that the hospital hours have changed a bit over the years, starting a little earlier. The hospital now requests approval to stay open 30 minutes longer Monday through Thursday, opening at 7:00 a.m. v. 7:30, and to increase its hours on Friday by opening half an hour earlier, at 7:00 a.m., and closing at 6:00 p.m.

Dr. Roskin expressed puzzlement that the bay window on the front of the building was not shown on the original plans, because he recalls that it was part of the concept from the beginning, as an area for cats to sun themselves, and the hospital has never received any complaints about it.

With regard to boarding, Dr. Roskin stated that he testified during the original Board hearing in this case that boarding dogs and cats would be part of the practice, as an ancillary service to

clients. He views it as a one thing feeding another, as part of a full-service hospital. Tr. at 134. For instance, some veterinary clients may request boarding, and someone who brings a pet for grooming may decide to also come to you for veterinary services. Dr. Roskin stated that when he testified about this aspect of the practice before the Board, he just presented the concept of doing non-medical boarding as incidental to the hospital operation. There was little discussion before the Board. Dr. Roskin recalls that the plan at the time was to have about 36 dog cages in the non-medical boarding area. He does not remember whether he told that to the Board, and the floor plan that was submitted to the Board did not show 36 cages. The floor plan, Exhibit 40, has lines in the non-medical dog boarding area that suggest there might have been 18 cages, but Dr. Roskin explained that the cages are stacked, and come in different sizes, which one can't see on the floor plan. The hospital opened with 36 cages in the non-medical dog boarding area, which is the number it still has today. Dr. Roskin acknowledged that the non-medical dog boarding area is configured differently on the current floor plan (submitted as an attachment to the noise study) than on the original floor plan submitted to the Board. He stated that the location of the exit and the location of the cages changed, although the intention was not to increase the number of cages – they always intended to have 36.

Dr. Roskin noted that the non-medical boarding areas are never full. First, the hospital seldom gets requests to board that many animals. Second, the sizes of the cages requires matching cages to various sizes of dogs. Large dogs don't go in an upper cage, for instance. He noted that based on recent records, the average occupancy rate is about 50 percent. He has discovered, moreover, that the staff will not book more than 26 pets because that's the maximum workload they feel they can manage well. Tr. at 98.

Dr. Roskin admitted that pets who are not regular clients have sometimes been accepted for boarding, for instance if they are sent by another veterinarian, but he has alerted his staff to make sure that only clients of record are accepted for boarding, and is willing to accept that as a condition of approval for the modification. Tr. at 99. He noted that the hospital does not advertise the boarding

operation, and there is nothing even inside the facility to indicate that boarding is available. Dr. Roskin suggested that many of the hospital's clients probably do not even know boarding is available.

Dr. Roskin presented three charts showing occupancy rates in the non-medical boarding area during 1997, 2000 and 2006. See Tr. at 117; Exs. 44-46. The occupancy rates were calculated by taking the number of cages (36 for dogs, 39 for cats) multiplied by the number of days in each month as the total potential number of pets in that month, then comparing that to the number of days each cage was occupied. The results indicate a maximum occupancy rate of 49 to 50 percent in August, the peak month for vacations. Dr. Roskin conceded that the occupancy rates have gone up over time, but attributed this to the increased number of clients at the hospital, and maintained that boarding is still an incidental part of the practice. He compared the small number of animals being boarded (e.g., 46 dogs coming in and out for boarding during the month of January 2006) to the 6,500 clients for whom the hospital has files. The Hearing Examiner requested that the Petitioner submit monthly information on the number of appointments in 1997, 2000 and 2006, to support a comparison between the total number of animals being treated and the number boarded. Dr. Roskin agreed, and added that the income received from boarding ranged from three percent of total revenue over the course of a year to nine percent, with an average of about five percent. Tr. at 133. He noted that the hospital has never received any complaints about the extent of animal boarding at the site. Tr. at 137.

The Hearing Examiner raised a point made by Transportation Planning Staff at the MNCPPC, which recommended prohibiting drop-off and pick-up activities for non-medical boarding on weekdays from 6:15 to 9:45 a.m. and 3:45 to 7:15 p.m. Dr. Roskin stated that the hospital currently does not allow people to come in for boarding purposes before 10:00 a.m., and clients do comply with that rule. He stated that currently the hospital allows boarding drop offs and pick ups up to an hour and a half before closing, which is 4:30 on Fridays and 5:30 Monday through Thursday. Dr. Roskin suggested that it would be difficult to get people to comply with a rule that they can drop off or pick up for boarding only between 10:00 and 3:45, since people want to get their pets home as soon as possible after they get back from vacation. Tr. at 215-16.

The Hearing Examiner noted Technical Staff's statement that the office manager had referred to "indoor runs" within the hospital. Dr. Roskin explained that the office manager was referring simply to the larger dog cages, which measure about three feet by six feet. He maintained that there are no "runs" per se, i.e. long, open areas for dogs to run. Tr. at 150.

2. Glenn Cook, traffic engineer. Tr. at 100-116.

Mr. Cook was designated an expert in transportation planning and traffic engineering. He described the location of the subject site on MD 108, a two-lane, undivided roadway. He noted that the site has a single access point on its south side, from MD 108, and a parking lot marked for 22 spaces, as shown on the proposed site plan, Exhibit 42.

Referring to the appointment and parking chart appended to the statement in support, Mr. Cook described it as something that was prepared in connection with addressing the parking issue with Technical Staff. It represents a worst case scenario assuming that each person drives, all appointments are kept and all appointments result in overlapping parking. Tr. at 106. Mr. Cook noted that his firm did not perform an intersection capacity analysis because the business has been in operation for some time, but he observed that traffic in the area generally operates within the congestion standard for the policy area.

At Technical Staff's request, Mr. Cook's firm counted the number of vehicles entering and exiting the site, first during the peak periods, then for essentially the whole day. (The parking counts covered 7:00 to 9:00 a.m. and 4:00 to 6:00 p.m. one day, and 9:00 a.m. to 1:00 p.m. on a second day.) They conducted the parking occupancy counts on Thursdays, which the Petitioner described as one of the busiest days of the week. During Mr. Cook's counts there was only one incident in 12 hours when a 23rd vehicle came to the site, which was a delivery truck.¹³ The truck parked on the side of the building, as Dr. Roskin stated sometimes happens. During the rest of the studied period, there were never more than 22 vehicles on site at one time. Mr. Cook opined that with the additional two spaces proposed as part of this modification, on-site parking would be adequate.

¹³ Mr. Cook's written submissions indicate that there were eight hours of counts, not 12.

Mr. Cook noted that the traffic study prepared for the original special exception application anticipated 26 trips during each of the morning and evening peak hours. He noted that his counts observed 11 cars entering or leaving the site during the morning peak hour, and 16 entering or leaving during the evening peak hour. Tr. at 108. Based on his investigation and analysis, Mr. Cook opined that the proposed modification would have no adverse impact on area roadways or the safety of vehicular and pedestrian traffic in the area. He further opined that occasional parking along the side of the building, near the trash dumpster, does not create a safety hazard. He described it as something people do all the time, not just at this site, and opined that there is enough room to turn around, with some maneuvering.

3. Alfred Blumberg, land planner. Tr. at 158-189.

Mr. Blumberg was designated an expert in land planning. He described the location of the subject site and surrounding land uses. Mr. Blumberg confirmed that the Odd Fellows property and the Sharp Street Church are just west of the property, and other surrounding properties are undeveloped, wooded, or have single-family residences. He described the north side of Route 108 as a mixture of undeveloped properties, some forest activities and an elementary school. Mr. Blumberg noted that there is residential development to the south along Norwood Road, and to the southeast as well.

Mr. Blumberg stated that the hospital has been at its current location for more than ten years. He described the Sandy Spring-Ashton Master Plan as primarily designed to preserve the agricultural and low-density residential areas in the vicinity, and the purpose of the Rural Village Overlay Zone as preserving and enhancing the rural village character of the Sandy Spring and Ashton centers. Tr. at 161. Mr. Blumberg noted that the subject property is located at the extreme western edge of the overlay zone area, and that its architecture is residential. He suggested that the peaked roofs with multiple dormers give the appearance of a residential structure, in keeping with other developments in the area. Mr. Blumberg finds that the building fits so well into its surroundings that it is almost too invisible from MD 108, seen just through a narrow window between trees and up the

driveway. This, he suggests, goes to the second purpose of the zone, which is to promote compatible relationships with regard to scale, siting, design features and orientation of buildings in the overlay zone area.

Mr. Blumberg contested Technical Staff's finding that the subject property would be required to go through site plan review in connection with this modification. Tr. at 162. He cited three circumstances, listed in the Rural Village Overlay Zone, when a property must go through site plan review: (i) development, which is defined as construction of a new building; (ii) additions or exterior improvements to a new building that increase gross floor area; and (iii) additions to off-street parking spaces or revisions to parking facilities that would otherwise require the approval of a new parking facilities plan under Section 59-E-4.1 of the Zoning Ordinance. Tr. at 162-63. The first two circumstances obviously do not exist here. Turning to the third, Mr. Blumberg stated that per Section 59-E-4.1 and 4.4., a "parking facility" has 25 or more parking spaces. The Petitioner in this case requests to add two parking spaces for a total of 24 – a number chosen "to meet the needs of the facility and to try to avoid having to go through site plan review." Tr. at 163-64.

The Hearing Examiner interpreted the Staff Report to state that site plan review would be required if the Petitioner needed to expand the parking lot beyond the 24 spaces requested, e.g. if the Board determined that additional parking spaces were needed to accommodate the animal boarding operation. Tr. at 164. On re-reading the pertinent section of the Staff Report, Mr. Blumberg accepted this interpretation. *Id.* at 164-65.

Mr. Blumberg opined that the proposed modification meets the objectives of the master plan and the Rural Village Overlay Zone. Tr. at 165.

Turning to the parking lot, Mr. Blumberg acknowledged that it is not a simple matter to determine what was actually approved, given that there are differences between the site plan approved by the Board of Appeals (which showed 27 parking spaces) and the landscape plan that was approved later, as was the practice at the time, by Technical Staff (showing 22 spaces). As constructed, the parking lot has spaces of varying widths, plus two parking islands along the western property line and

one near the front entrance. Tr. at 168. Petitioner now proposes to remove one of the parking islands and re-stripe some of the spaces that exceed the current width requirement to add two more parking spaces, which is the number they feel is needed based on the number of employees and the usage of the building (and the maximum permitted without triggering site plan review). No additional landscaping is proposed.

Addressing other aspects of the proposed modification, Mr. Blumberg stated that the bay window was not shown on the site plan originally approved by the Board, but it was on the construction documents that were submitted to obtain a building permit. He stated that the two additional parking spaces would increase the impervious area by less than 5,000 square feet, so neither sediment control nor stormwater management would be required. Tr. at 173.

Mr. Blumberg opined that from a land planning perspective, the modest modification proposed to the parking lot would have no adverse effects on the neighbors.

With regard to non-medical boarding, Mr. Blumberg cited a 2001 Opinion of the Board of the Appeals (Case S-2469) granting a special exception for a veterinary hospital that included boarding -- in a zone that does not permit animal boarding either by right or as a special exception. Because the subject property was in a commercial zone, the specific condition of the use that animal boarding is prohibited was not applicable.

Mr. Blumberg opined that all elements of the subject animal hospital and the proposed modification should be considered inherent adverse effects, including traffic, animals on site, barking dogs, parking lot lighting, deliveries, people dropping off and picking up animals, dogs and cats staying overnight and dogs being walked outside. As Dr. Roskin testified, animals would stay overnight and dogs would have to be walked as part of the hospital's main activities, even if there were no non-medical boarding. Tr. at 177. Mr. Blumberg further opined that boarding dogs is an inherent characteristic of this use, having been approved by the Board of Appeals in 1992. [The Hearing Examiner finds this conclusion surprising in light of the fact that, per the specific condition of the use that prohibits animal boarding, non-medical boarding cannot be considered a non-inherent

characteristic of veterinary hospitals generally. Typically, if an element of a use is not an inherent characteristic of that category of use, i.e. one necessarily associated with that type of use, it is considered non-inherent in individual cases.] Finally, he concluded that the proposed modification would have no adverse impact on surrounding properties or the neighborhood, and would be within the scope of the use as approved in 1992. Tr. at 178-79.

In response to a question from the Hearing Examiner, Mr. Blumberg described the general neighborhood as the higher density areas surrounding the intersection of MD 108 and Norwood Road. The neighborhood includes a small townhouse cluster in the R-T Zone, a bank headquarters in the O-M Zone, some commercial development in the C-2 Zone and single-family residential development in the R-200 Zone. Outside this defined neighborhood the zoning changes to Rural Neighborhood Cluster, which is very low density.

In response to a question from the People's Counsel, Mr. Blumberg stated that parking lot lighting consists of three 15-foot pole lights, plus bollard lights, 42 inches high, lighting the sidewalk area immediately in front of the building. He noted that there are cut-offs on all of the fixtures that prohibit light from spilling over into the residential areas to the west. In addition, all three pole lights are in the western portion of the property, which has a forested edge. Tr. at 182-83. These lighting fixtures, Mr. Blumberg stated, were shown in part on the landscape and lighting plan that Technical Staff approved after the special exception had been approved, and also on an electrical plan.

The People's Counsel also asked for more detail concerning Mr. Blumberg's research on past animal hospital cases. Mr. Blumberg replied that he requested from the Board's staff opinions for all animal hospitals during the period from 1990 to 2005. In that time period, there were three that included animal boarding without a separate animal boarding special exception, and 13 that did not include animal boarding. The Hearing Examiner notes that this information does not indicate whether the three cases where animal boarding was permitted took place before or after the 2002 zoning text amendment that made the need for a separate animal boarding special exception explicit.

4. Gerald Henning, acoustical engineer. Tr. at 192-214.

Mr. Henning was designated an expert in acoustical engineering. Mr. Henning testified that during his first site visit, there were seven dogs in the medical boarding area (two small, two medium and three large) and 17 in the grooming and non-medical boarding area (five small, five medium and seven large). Tr. at 196. He stated that there are some soundproofing materials in the boarding areas, such as an acoustical ceiling and some sound absorbent panels. To measure sound levels from the dogs, Mr. Henning had someone disturb the dogs inside while he measured sound levels, both inside and outside the boarding areas. He also measured background noise levels around the property line to establish a baseline noise level without barking dogs. Mr. Henning did the testing on June 23 and 24, from 10:30 a.m. to 4:00 p.m. and again at night, into the early morning of the next day. No one purposely disturbed the dogs during the nighttime visit, but Mr. Henning reports that there was some barking while he was outside near the dogs' glass-block enclosure, using a flashlight to make notes. Since they were barking, Mr. Henning took measurements then, as well.

Mr. Henning reported that the primary background noise at this site was traffic, although he also picked up some noise from the heating and ventilation systems.

Mr. Henning took sound measurements from the middle of each of the four property boundary lines. He found that the background noise was louder than the sound of the dogs barking, and although barking was at times barely perceptible, it was not loud enough to measure at the property lines. Tr. at 197-98. This was true both during the daytime, when ambient noise levels were between 56 and 68 decibels, and at night, when ambient noise dropped to between 42 and 55 decibels (the higher noise levels were, not surprisingly, on the side of the property along MD 108). Based on these measurements, Mr. Henning opined that the noise emanating from the subject animal hospital has no adverse impact on neighboring properties or the general neighborhood. Tr. at 198.

Mr. Henning also explained his analysis of the noise standards in Section 59-G-2.32 of the Zoning Ordinance, which contains the specific conditions for the use. This section has three criteria which, in Mr. Henning's view, are somewhat contradictory. One criterion requires levels inside boarding

areas not to exceed 40 (a measures of decibels that is weighted to simulated the way humans hear) when measured ten feet from the building, outside. Another criterion establishes maximum noise levels at the property line, broken down into a 60- limit during the day and 50 at night, both of which are satisfied in this case. The third criterion requires that the maximum receiving property line sound levels not exceed characteristic ambient sound levels by more than three at any time. Mr. Henning finds these criteria contradictory because if a facility satisfies the first, with 40 ten feet from the building, then obviously noise levels will be substantially lower than 50 at the property lines. The Hearing Examiner suggested another reading of these criteria, viewing them as distinguishing between a specific source of interior noise and the general noise levels on the property, which may include exterior noise sources such as dogs exercising. More importantly, the Hearing Examiner observed that her job is to enforce the Zoning Ordinance as written, not to quarrel with whether it is well-crafted.

The second two noise criteria are satisfied at this site. In assessing compliance with the 40--ten-feet-from-the-building requirement, Mr. Henning had a hard time isolating the noise from the barking dogs. During the day, traffic noise was loud enough that it was hard for Mr. Henning to find periods where he was confident that he was measuring primarily the barking dogs, and not the surrounding ambient noise. The best measurements he got showed sound levels from inside the facility of 50 at ten feet from the building. Tr. at 207. Mr. Henning expressed frustration that this should represent a failure to comply with the Zoning Ordinance, when in his view, the sound measurements at the property line demonstrate conclusively that the noise from this facility would not be a nuisance for the neighbors. To provide some context, he stated that typical conversational speech three feet away from the speaker is about 60 , and a 10- reduction in sound levels is perceived as cutting the sound in half. Thus, sound at 40 would be perceived as one-quarter as loud as 60 . Tr. at 210.

Mr. Henning observed that nothing in the proposed modifications would have an adverse impact on the level of noise emanating from the hospital. Tr. at 211. He opined that setting aside the

County's regulations, nothing in his observations suggests that the subject animal hospital has any adverse effect on the adjoining properties due to noise. Tr. at 212.

B. People's Counsel

The People's Counsel, Martin Klauber, participated actively in questioning witnesses and discussing procedural matters during the hearing, but did not make an opening or closing argument.

IV. CONCLUSIONS

A special exception is a zoning device that authorizes certain uses provided that pre-set legislative standards are met. Pre-set legislative standards are both specific and general. The special exception is also evaluated in a site-specific context because there may be locations where it is not appropriate. Weighing all the testimony and evidence of record under a "preponderance of the evidence" standard (see Code §59-G-1.21(a)), the Hearing Examiner concludes that the proposed modification, with the limitations and conditions recommended at the end of this report, would satisfy all of the specific and general requirements for the use. Before establishing the basis for this conclusion, however, this report must first address legal arguments that Petitioner's counsel raised during the hearing and in a post-hearing brief concerning: (1) the Board's authority to require Dr. Roskin to bring the hospital up to current noise standards; and (2) the Board's authority over the non-medical boarding operation.

A. Board of Appeals Authority to Require Compliance with Current Noise Standards

The specific conditions for the veterinary hospital special exception, found in Section 59-G-2.32 of the Zoning Ordinance, were amended extensively during the 2002 comprehensive review of the Zoning Ordinance, adding several substantive requirements and changing others. When the County Council changes the specific conditions for a special exception category, it has two basic options with regard to existing land uses operating under past grants of that special exception: (i) allow them to become non-conforming uses, to be phased out over time; or (ii) designate them as conforming

uses that may continue and even expand, provided that they meet the newly-adopted standards specified in the Zoning Ordinance. If the Council says nothing about existing uses in the category being amended, the moment the new ordinance takes effect they will become non-conforming uses, because they were lawful when established but they no longer conform to the requirements for the use established in the Zoning Ordinance. See Section 59-A-2.1, page 59A-32. A non-conforming use may not be extended in any way, nor may the building be repaired to continue the use if it is destroyed or seriously damaged. See Section 49-G-4.11. These limitations tend to have the effect, over time, of eliminating non-conforming uses.

Alternatively, the Council may specify that existing uses in the special exception category being amended are conforming uses, which are not subject to the limitations on non-conforming uses. This is the course of action the Council chose in its 2002 amendment of Section 59-G-2.32, which includes the following language, known as a “grandfather” clause:

Any veterinary hospital lawfully existing prior to the effective date of this ordinance is a conforming use, and may be extended, enlarged or modified by special exception subject to the provisions set forth in this section.

Section 59-G-2.32(c).

Under this provision, the Olney-Sandy Spring Veterinary Hospital is a conforming use, with the right to continue operating indefinitely at the level and with the facilities approved in 1992. Any extension, enlargement or modification of the use, however, may be permitted only *subject to the provisions set forth in Section 59-G-2.32 as currently written*. Because the Petitioner constructed the building and parking lot in a manner that differs from the plans approved by the Board of Appeals, and chose to enlarge the business from the level that the Board approved, the modifications necessary to approve those changes may be granted only if they conform to the current language of Section 59-G-2.32. In the Hearing Examiner’s view, this means that the Board cannot approve the building as constructed unless the building conforms to the current provisions of Section 59-G-2.32, including the noise requirements.

Petitioner's counsel argues that the hospital cannot be made to comply with a noise standard enacted after the approval of the facility because the Petitioner "does not seek to modify in any way the nature, character or intensity of the boarding facility"¹⁴ (the boarding facilities are the sole source of noise that is audible outside the building). Ex. 54(a) at 7. The Hearing Examiner, however, finds to the contrary. Based on a comparison of the Board's original Opinion in this case with the Supplemental Statement of Operations that was submitted after the hearing, the increase in employees that has taken place on the site, for which Dr. Roskin seeks approval as part of this modification, includes an increase in non-medical boarding staff from two employees (full-time or part-time not specified) to three (two full-time and one part-time).¹⁵ Compare Opinion at 2 with Ex. 55(g) at 2. This increase became necessary, presumably, to support the increase over time in the number of animals boarded, as shown by the data discussed in Part II.E. Thus, the Petitioner has requested a modification that not only modifies, but accommodates expansion of the non-medical boarding operation.

The Supplemental Statement of Operations defines in some detail the work responsibilities of various employee positions. As discussed in note 15, these definitions suggest that "boarding staff" are responsible for animals in the non-medical boarding wards, while "veterinary technicians" are responsible for animals in the wards for animals that are boarding for medical reasons. See Ex. 55(g) at 2. The number of veterinary technicians employed by the hospital has increased significantly over time, from two listed in the original Opinion to nine today. While the record does not specify how much of this increase is necessitated by larger numbers of animals in the medical boarding wards, logic suggests that the number of animals requiring boarding for medical reasons has increased

¹⁴ Petitioner's counsel clarified in post-hearing correspondence that despite his stating this argument, the Petitioner is offering to install the noise mitigation measures described in Part II.D.4.

¹⁵ The Hearing Examiner considers the term "boarding staff" to apply to non-medical boarding staff based on the clear, thorough position descriptions, which specify that the duties of "veterinary technicians" include walking patients and giving them medication and food, while the duties of "boarding staff" include making boarding reservations, admitting and discharging boarders, walking and feeding them and monitoring them for any problems. See Ex. 55(g) at 2. Because the veterinary technicians' duties include walking and feeding patients, the Hearing Examiner concludes that veterinary technicians take care of animals boarding for medical reasons, and boarding staff take care of animals in non-medical boarding wards.

with the general increase in the size of the operation. The Hearing Examiner concludes, based on testimony and other evidence concerning the overall increase in the number of animals treated at the hospital, that some portion of the increase in veterinary technicians is attributable to expansion of medical boarding. Thus, the proposed modifications directly affect all of the boarding facilities, which are the portions of the building where noise mitigation measures are necessary to comply with current standards. Even if this were not the case, the Hearing Examiner would consider it incumbent upon the Board to deny the requested approval for the building as constructed if the building did not conform to current standards. The increase in medical and non-medical boarding-related employees creates a stronger nexus, but in the Hearing Examiner's view, the need for a modification to approve the building as constructed would be sufficient.

Petitioner's counsel also argues that the Board's authority to require compliance with current noise standards is discretionary, based on the following text from Section 59-G-1.3(c)(4)(A), which establishes the Board's responsibilities following a modification hearing:

The Board may reaffirm, amend, add to, delete or modify the existing terms and/or conditions of the special exception. The Board may require the underlying special exception to be brought into compliance with the general landscape, streetscape, pedestrian circulation, noise, and screening requirements of 59-G-1.26, if (1) the proposed modification expands the total floor area of all structures or buildings by more than 25%, or 7,500 square feet, whichever is less, and (2) the expansion, when considered in combination with the underlying special exception, changes the nature or character of the special exception to an extent that substantial adverse effects on the surrounding neighborhood could reasonably be expected.

The language quoted above authorizes the Board to require that an existing use comply with standards specified in Section 59-G-1.26, under certain circumstances. Mr. Lynott is correct that the Board's authority in this respect is discretionary. Mr. Lynott misunderstands, however, the source of the noise requirements with which the hospital must comply to obtain approval for the instant modification. The relevant noise requirements are those imposed under Section 59-G-2.32, not the more general provision for noise mitigation measures in Section 59-G-1.26. Moreover, the subject application does not satisfy the prerequisites for the Board to require compliance with Section 59-G-

1.26, because no increase in the floor area of the building is proposed. The language quoted above is, therefore, irrelevant.

Petitioner's counsel further argues that the Board is precluded from imposing noise standards enacted after the approval of the special exception by the principles of *res judicata* and estoppel. The principal of *res judicata* holds that facts or issues that were litigated in a prior proceeding and were determined, on the merits, by final judgment of a court, may not be litigated in a subsequent action between the same parties. See *Cicala v. Disability Review Board*, 288 Md. 254, 263 (1980); *Klein v. Colonial Pipeline Co.*, 55 Md. App. 324, 339 (1983). The doctrine of *res judicata* has sometimes been applied to administrative decisions made by a quasi-judicial agency where there has been no change in circumstances, see *Woodlawn Area Citizens Association, Inc. v. Bd. of County Commissioners for Prince George's County*, 241 Md. 187 (1966), but in other cases its application to administrative proceedings has been questioned, particularly where the original administrative decision was based on an error of law. See *Klein*, supra, 55 Md. App. at 339. The courts agree, at a minimum, that even if *res judicata* does not apply, an administrative agency is not justified in reversing a prior decision relating to the same case unless there is evidence of fraud, surprise, mistake, inadvertence or a change in fact or law. See *Gaywood Community Association, Inc. v. Metropolitan Transit Authority*, 246 Md. 93 (1966).

In the zoning context, the principal of equitable estoppel holds that a local government exercising its zoning powers will be estopped (precluded from taking action) when a property owner, relying in good faith on some act or omission of the government, has made "such a substantial change in position or incurred such extensive obligations and expenses that it would be highly inequitable and unjust to destroy the rights which he ostensibly had acquired." See *Sycamore Realty v. People's Counsel*, 344 Md. 57, 64 (1996). Mr. Lynott would argue that under this doctrine, the Board is precluded from imposing new noise requirements on the hospital because the hospital relied on the original grant of special exception in constructing its building and has the right to continue using that building as is. The application of equitable estoppel in the zoning context has been squarely rejected

by Maryland's highest court as inconsistent with Maryland's doctrine of vested rights. See *Sycamore*, *supra*, 344 Md. at 68-69. The Court of Appeals acknowledged in that case that "there may be some, still narrower theory of zoning estoppel that may be compatible with our vested rights rule," but for the time being, no rule of zoning estoppel is recognized in Maryland. See *id.* Moreover, equitable estoppel is generally not permitted to prevent a government from enforcing its laws. See *Marzullo v. Kahl*, 366 Md. 158, 196-97 (2001).

The application of *res judicata* and equitable estoppel to the present proceedings is misplaced. If the hospital had constructed its building and parking lot according to the approved plans, and had not expanded the number of employees (and therefore the size of the operation) without Board approval, it would have the right to continue operating indefinitely under the original grant of special exception. Unfortunately, it appears that Dr. Roskin did not understand, when the special exception was first approved, that construction was required to conform to the approved plans (as stated explicitly in the conditions of approval), and that the business could not be expanded without prior approval from the Board. As a result, a modification is now necessary to legitimize the changes that have taken place since 1992. As discussed above, under the grandfather clause of Section 59-G-2.32, a modification of the special exception may be approved only subject to the current requirements for the use. Montgomery County would not seek to impose new noise standards on the hospital if it had not chosen to take actions that violate the terms and conditions of the special exception, requiring a modification of the grant. Under these changed circumstances, neither *res judicata* nor estoppel is available to Dr. Roskin.

B. Board of Appeals Authority Over Non-medical Boarding Operation

Mr. Lynott argues that the Petitioner has a vested right to continue the non-medical boarding operation, and that the County is equitably estopped from prohibiting the continuation of that use. He makes these arguments from the premise that Dr. Roskin has not proposed any modification of the veterinary hospital use that affects the operation, character or intensity of the non-medical boarding operation. As discussed in the previous section, however, this premise is faulty. The increase

in employees that has taken place on the site, and for which Dr. Roskin seeks approval as part of this modification, includes an increase in non-medical boarding staff from two employees (full-time or part-time not specified) to three (two full-time and one part-time). *Compare* Opinion at 2 with Ex. 55(g) at 2. Thus, the modification request directly affects the operation and intensity of the non-medical boarding operation.

As discussed in the previous section, modification of the subject special exception brings it within the provisions of Section 59-G-2.32(c), which specifies that any modification of the use is subject to the provisions set forth in that section. Unlike the building as a whole, which may be brought into compliance with the current requirements of Section 59-G-2.32 by the installation of noise mitigation measures, it is not possible to bring the non-medical boarding operation into compliance with the current requirements of 59-G-2.32, because 59-G-2.32(b)(14) states explicitly that animals may be kept overnight at the hospital only for medical purposes, and that boarding for non-medical purposes requires a separate application for an “animal boarding place” special exception. Accordingly, the Hearing Examiner concludes that the Board does not have authority to approve a modification that is directly related to the non-medical boarding operation – such as an increase in the number of boarding staff.

Neither the doctrine of vested rights nor equitable estoppel will preserve Dr. Roskin’s non-medical boarding operation if he pursues a modification that increases the number of boarding staff. As discussed in the previous section, equitable estoppel has been rejected in the zoning context by Maryland’s highest court, based on a finding that it is inconsistent with Maryland’s doctrine of vested rights, and it generally is not permitted to prevent a government from enforcing its laws. See *Sycamore*, *Marzullo*, *supra*. The Maryland doctrine of vested rights holds that when a property owner “obtains a lawful building permit, commences to build in good faith, and completes substantial construction on the property, his right to complete and use that structure cannot be affected by any subsequent change of the applicable building or zoning regulations.” *Id.* at 67. In the present case, Dr. Roskin’s right to continue the non-medical boarding operation would not be affected by the subsequent

change in the applicable zoning regulations if he did not seek a modification directly related to that operation – the increase in boarding staff. He arguably has a vested right to continue the use that the Board approved in 1992, but not to expand it.¹⁶

The Hearing Examiner reached the conclusion that the non-medical boarding operation could be preserved, if not for the increase in boarding staff, after reviewing the detailed staffing

¹⁶ There is a question as to whether Dr. Roskin's otherwise vested right to maintain the non-medical boarding operation as originally approved is invalid because the Board lacked authority to permit non-medical boarding without an "animal boarding place" special exception, even in 1992. Case law supports a conclusion that a right does not vest if the permit or special exception that created it was unlawful, *i.e.*, issued without jurisdiction, or possibly when based on a mistake of law. See *Powell v. Calvert County*, 368 Md. 400, 414-15 (2002); *Marzullo v. Kahl*, 366 Md. 158, 194 (2001).

The Zoning Ordinance in 1992 included two separate special exception uses: "veterinary hospital," under Section 59-G-2.32, and "animal boarding place," under Section 59-G-2.02. Moreover, the two terms were defined in Section 59-A-2.1 in a way that clarified their separate status. "Hospital, veterinary" was defined as a building in which veterinary care is provided to domestic animals, "but not to include an animal boarding place," while "animal boarding place" was defined as any building or land "other than a veterinary hospital" that is used for the boarding, breeding or care of domestic animals (these definitions have not changed since their enactment in 1977).

Mr. Lynott argued during the hearing that the words "other than a veterinary hospital" in the definition of animal boarding place mean that the activities of an animal boarding place should not be considered an "animal boarding place" when conducted at a veterinary hospital. See Tr. at 33-34. He suggests that this means a veterinary hospital can include all the activities of an animal boarding place without obtaining an "animal boarding place" special exception. This interpretation ignores the fundamental construct of the Zoning Ordinance that no use is permitted unless the Zoning Ordinance says that it is. Use tables for each category of zones specify which uses are permitted in each zone, by right or by special exception. In the R-200 Zone and the Rural Overlay Zone, a use that comes within the definition of an "animal boarding place" is permitted only by special exception. The Hearing Examiner interprets the phrase "other than a veterinary hospital" in the definition of "animal boarding place" as an effort to distinguish animal boarding as a separate use, while avoiding the undesirable outcome of every veterinary hospital requiring a "animal boarding place" special exception even if it boards animals solely for medical reasons.

Any doubt about the intended meaning of the two definitions and the two separate special exceptions is dispelled by reviewing the 1977 zoning text amendment that placed the relevant law in substantially the form found in 1992. See Ordinance No. 8-53, effective Nov. 15, 1977 (Ex. 26 in this record). The Opinion portion of the amendment states explicitly the Council's intention to treat an animal boarding place and a veterinary hospital as two separate land uses, to be reflected in the zones where each is allowed and in the conditions controlling the granting of a special exception. The ordinance itself replaced the previous special exception category "Animal hospitals, veterinary clinics and animal boarding places" with two separate special exception categories: Section 59-127, Animal Boarding Places, and Section 59-152A, Hospitals, Veterinary. The ordinance also added the phrase "other than a veterinary hospital" to the definition of "animal boarding place," as quoted above, and added the definition of "hospital, veterinary" quoted above as a new definition. The only intent that may reasonably be construed from these changes is to establish that animal boarding, apart from the medically necessary boarding that is inherent in a veterinary hospital, is a separate use requiring a separate special exception.

The Hearing Examiner is persuaded that the Board lacked authority, in 1992, to permit a combined veterinary hospital/animal boarding place use with only one special exception. What is not clear is whether the Board was authorized to approve a limited non-medical boarding operation as an accessory use, which is what it did in this case, relying on Dr. Roskin's testimony that he would "occasionally board animals for his regular clients." Opinion at 2. Given the uncertainty as to whether the Board committed an error of law in permitting this accessory use, the Hearing Examiner finds that fairness argues against prohibiting the use on this basis.

information that was submitted after the hearing. This conclusion was not, therefore, discussed at the hearing. If it had been discussed, the Hearing Examiner expects that Dr. Roskin would have offered to reduce the number of boarding staff to the 1992 level in order to preserve the ability to offer non-medical boarding as a service to his clients. In the interest of fairness, therefore, the Hearing Examiner has recommended a condition of approval that caps the total number of employees at 24, rather than 25, with a limit of two boarding staff. This will allow the Board to approve the proposed modification without requiring the elimination of the non-medical boarding operation. The recommended condition does not reduce the number of employees permitted on the site at one time, because the Supplemental Statement of Operations indicates that the hospital presently has two boarding staff on site at one time during the busy times of year. The Hearing Examiner expects that the hospital might continue to have two boarding staff on site at one time, even without the third, part-time person, because there may be overlapping shifts.

Having determined that the non-medical boarding operation may continue at the level that was approved in the original Opinion, we must next determine what that level is. The Opinion noted that Dr. Roskin said he would “occasionally board animals for his regular clients.”¹⁷ Opinion at 2. Dr. Roskin acknowledges that the non-medical boarding operation has not stayed within the parameters set in the Opinion, because at least in the recent past, his staff has accepted animals for boarding without regard to whether they were regular clients. The record does not indicate what percentage of the animals boarded during 2005-2006, the last period for which data has been provided, were regular clients, but the evidence indicates that some of the animals were not regular clients. The Hearing Examiner therefore adopts, as a first guidepost, the premise that the level of animal boarding that

¹⁷ This description may have been a bit disingenuous, given that the floor plan submitted at that time included separate dog and cat boarding areas for non-medical boarding. Logically, one might expect that if a veterinary hospital intended to board animals for non-medical reasons only “occasionally,” the hospital would plan to accommodate this “occasional” boarding within the medical boarding ward, rather than going to the expense of creating separate areas for non-medical boarding. As noted in Part II.E, the non-medical boarding areas, as constructed, occupy roughly nine percent of the considerable floor space of the hospital. Nevertheless, not having attended the 1992 hearing, for purposes of this report and recommendation the Hearing Examiner will take Dr. Roskin at his word.

should be considered consistent with the original approval is something lower than the level indicated by the 2005-2006 figures, which included animals that were not regular clients.¹⁸ As a second guidepost, the Hearing Examiner considers what the Board's expectation may have been regarding the level of animal boarding that would take place. The floor plan submitted in 1992 depicted two dog wards and two cat wards, although it did not specify that the larger ones would be for non-medical boarding. Considering Dr. Roskin's testimony, the dictionary defines "occasional" as occurring "from time to time." *American Heritage Dictionary*, Second College Edition, 1985. The Board might have expected that the hospital would board animals from time to time, meaning on something less than a daily basis, not as a regular course of events. The small number of animals boarded during the first year for which we have data, 1997, was consistent with such an expectation.¹⁹ Some growth in boarding also would have been a reasonable expectation with the normal growth of the business, even if it had stayed within the employment levels originally approved.

With the installation of the extensive noise mitigation measures the Petitioner has proposed, it appears that the only adverse effect of the non-medical boarding operation is to increase the number of trips to and from the site. The number of trips related to dropping off and picking up boarders would not be large enough to make a noticeable impact on local streets, even at the level of 60+ dogs and as many as 44 cats in and out during the peak months of 2006. Even a small number of additional vehicles on the site could, however, have a noticeable impact on the limited on-site parking.

In the interest of fairness, the Hearing Examiner has recommended limits on the number of dogs and cats boarded in any given month that are based on splitting the difference between the low levels experienced when the hospital was fairly new, and the higher levels experienced in 2005-2006. The recommended conditions of approval also require the hospital to verify that each animal accepted

¹⁸ During the 12 months from May 2005 to April 2006, the non-medical dog boarding ward had only one month with fewer than 35 dogs coming in and out, five months with between 40 and 55 dogs, and six months with more than 60 dogs boarding during the course of the month.

¹⁹ In 1997, the non-medical dog boarding ward had fewer than ten dogs per month for six months of the year, and only two months when the number of dogs in and out exceeded 15. The heaviest volume was 27 dogs in August.

for boarding is a “regular client,” which I have defined as an animal who has received medical care at the hospital during the previous 18 months.²⁰

Transportation Planning Staff at the MNCPPC recommended that drop-offs and pick-ups for the non-medical boarding facility be prohibited during the morning and evening peak periods (and for 15 minutes before and after). The Hearing Examiner considers this unnecessary. There is not a shred of evidence that the relatively small number of trips at issue would have any adverse impact on area roadways. There is evidence, however, to suggest that concentrating these trips during the middle of the day, as Staff suggests, could burden the parking lot, which is busiest during the shift-overlap period from 10:00 a.m. to 3:00 p.m.

C. Standard for Evaluation

Having resolved the two threshold legal questions discussed above, this report now proceeds to assess compliance of the proposed modification with the general and specific conditions for the use.

The standard for evaluation prescribed in Code § 59-G-1.2.1 requires consideration of the inherent and non-inherent adverse effects of the proposed use, at the proposed location, on nearby properties and the general neighborhood. Inherent adverse effects are “the physical and operational characteristics necessarily associated with the particular use, regardless of its physical size or scale of operations.” Code § 59-G-1.2.1. Inherent adverse effects, alone, are not a sufficient basis for denial of a special exception. Non-inherent adverse effects are “physical and operational characteristics not necessarily associated with the particular use, or adverse effects created by unusual characteristics of the site.” *Id.* Non-inherent adverse effects, alone or in conjunction with inherent effects, are a sufficient basis to deny a special exception.

Technical Staff have identified seven characteristics to consider in analyzing inherent and non-inherent effects: size, scale, scope, light, noise, traffic and environment. For the instant case,

²⁰ One could argue that regular clients are those who have received medical care within the previous 12 months, since animals often have yearly physicals and booster shots. The 18-month timeframe is designed to avoid penalizing pet owners who may fall behind in yearly updates.

analysis of inherent and non-inherent adverse effects must establish what physical and operational characteristics are necessarily associated with a veterinary hospital. Characteristics of the proposed modification that are consistent with the characteristics thus identified will be considered inherent adverse effects. Physical and operational characteristics of the proposed modification that are not consistent with the characteristics thus identified, or adverse effects created by unusual site conditions, will be considered non-inherent adverse effects. The inherent and non-inherent effects thus identified must be analyzed to determine whether these effects are acceptable or would create adverse impacts sufficient to result in denial.

The Hearing Examiner considers the following to be inherent characteristics of a veterinary hospital: a building adequate to house the hospital; parking facilities; lighting; traffic generated by employees, clients and deliveries; and dogs being walked outdoors.

In this case, none of the proposed modifications would result in non-inherent physical or operational characteristics, nor have any unusual site characteristics been identified. Nothing in the record suggests that the building as constructed is unusual in its size, and its design appears to blend well with surrounding uses. The parking facility is not unusual in its size or configuration, and is well landscaped. The number of parking spaces is not abundant, given the size of the use, but it satisfies the minimum number of spaces specified in the zoning ordinance and the evidence supports a conclusion that is sufficient. Accordingly, the Hearing Examiner concludes that there is little justification to consider the parking lot a non-inherent physical characteristic. The proposed modifications would not affect the exterior lighting, which is not, in any event, excessive. Nothing in the record suggests that either the level of traffic generated by the use or the amount of dog-walking activity is unusual for a veterinary hospital.

For all of these reasons, the Hearing Examiner concludes that with the conditions recommended at the close of this report, the inherent adverse effects of the proposed modification are not sufficient to warrant denial.

D. Specific Standards

The specific standards for a veterinary hospital are found in Code § 59-G-2.24. The Technical Staff report and the Petitioner's written evidence and testimony provide sufficient evidence that with the recommended conditions, the proposed modification would be consistent with these specific standards, as outlined below.

Sec. 59-G-2.32. Hospital, veterinary.

- (a) In any commercial, central business district or transit station zone where permitted by special exception, a veterinary hospital must comply with the following conditions and requirements:

- (1) There must be no runs, exercise yards, or other facilities for the keeping of animals in any exterior space.

Conclusion: Not applicable.

- (2) All areas for the keeping of animals must be soundproofed.

Conclusion: Not applicable.

- (b) In any residential or rural zone where permitted by special exception, a veterinary hospital must comply with the following conditions and requirements:

- (1) In the R-150, R-90, and R-60 zone, the maximum lot size is one-half acre. In the R-60 zone a veterinary hospital must be located along a major highway with an existing right-of-way width of no less than 90 feet, and be adjacent to or confronting a central business district or a property zoned for commercial use.

Conclusion: Not applicable.

- (2) Exterior areas used to exercise, walk, or keep animals must be set back from any property line 200 feet and screened from adjacent residential properties. All exterior exercise areas and runs must be fenced for the safe confinement of animals.

Conclusion: The exterior area used to walk animals has been at its current location since the inception of the use, and no change is proposed. This area is not 200 feet away from the only adjacent residential property, nor was it when the use was approved in 1992. In 1992, however, the language of Section 59-G-2.32 with regard to exterior areas was somewhat more murky than it is today. The relevant provision read as follows:

Exterior areas for the keeping of animals shall be provided with fencing capable of confining the animals kept, and screened from adjacent residential properties. Soundproofed interior areas where animals are kept shall not be located within 50 feet of any lot line. Exterior areas and non-soundproofed interior areas shall not be located within 200 feet of any lot line.

In reviewing the original site plan, the Board may have interpreted “exterior areas for the keeping of animals” to refer to runs or exercise yards, rather than the open area used for walking dogs. Thus, the Board may have felt that the 200-yard setback requirement did not apply to the dog-walking area. Given that the proposed modification would have no effect on the location of the dog-walking area, the Hearing Examiner sees no grounds to require compliance with this standard as currently written.

The modification would provide for the required fencing to enclose the dog-walking area, which was installed some time ago.

- (3) For all buildings in which animals will be present, maximum expected interior sound levels must be reduced to 40 dBa (A-weighted decibels) outside, measured at ten feet from the structure.

Conclusion: The Hearing Examiner accepts Technical Staff’s conclusion that, based on the submissions made by the Petitioner’s noise expert, the proposed noise mitigation measures would bring interior sound levels into compliance with this standard. See Ex. 63.

- (4) All buildings and accessory structures must be set back from any property line a minimum of 50 feet.

Conclusion: No changes are proposed to the location of the building, which is set back at least 50 feet from all property lines. No accessory structures are existing or proposed.

- (5) No animal may be outdoors between 6 p.m. and 8 a.m.

Conclusion: Dr. Roskin has agreed to comply with this provision. This will require a change in the current mode of operation, which includes walking dogs as early as 7:00 a.m. and as late as 7:00 p.m.

- (6) On weekdays, the sound at the nearest receiving property line must not exceed 60 dBa between the hours of 8 a.m. to 6 p.m. and 50 dBa between the hours of 6 p.m. to 8 a.m. On Saturdays, Sundays, and federal holidays, the sound at the nearest receiving property line must

not exceed 60 dBa between the hours of 9 a.m. to 6 p.m. and 50 dBa between 6 p.m. and 9 a.m. Terms are defined in accordance with the Montgomery County Noise Ordinance (Chapter 31B of the Montgomery County Code). In any event, the predicted maximum receiving property line sound levels must not exceed the characteristic ambient sound levels by more than 3 dBa at any time.

Conclusion: The Hearing Examiner accepts the Petitioner's unrefuted evidence that even without the proposed noise mitigation measures, the hospital satisfies this standard. See Ex. 18(h), testimony of Mr. Henning.

- (7) Dogs must not be walked or exercised in outdoor areas that are off-site.

Conclusion: Dr. Roskin testified that dogs are never walked or exercised off-site.

- (8) In addition to the submittal requirements in Sec. 59-A-4.22, the applicant must submit the following information. Applications submitted without this information are incomplete and will not be accepted or assigned a case number:
 - (i) acoustical engineering studies that demonstrate that the proposed use meets the standards in Sec. 59-G-2.02(b)(3) and (6) above. The studies must show the worst scenario sound level. The statement of operations must be sufficiently detailed to allow determination of how often the worst scenario sound level occurs.
 - (ii) detailed floor plans that show all the interior areas and their use designations,
 - (iii) site plans that show the layout of all exterior areas used to exercise, walk, or keep animals.

Conclusion: All of these submission requirements have been satisfied. See Exs. 58(a), 55(a), 18(h), 55(b) and 55(f).

- (9) The Board must specify a minimum number of off-street parking spaces, taking into consideration the number of employees on the maximum shift, the number of doctors practicing simultaneously, and the number of appointments and deliveries. This number must in no case be less than 5.

Conclusion: The Hearing Examiner finds that the preponderance of the evidence supports a conclusion that the 24 parking spaces Petitioner proposes would be sufficient to accommodate the needs of this use. A parking capacity study that covered eight hours on two different

Thursdays found that no more than 22 spaces were filled at any one time, plus one occasion when a 23rd vehicle, a delivery truck, came onto the site and parked on the side of the building, in the paved area near the dumpster that is not intended for parking. Technical Staff observed a higher rate of parking usage during a 45-minute visit on a Tuesday, finding that the entire 22-space parking lot was completely full at times, plus there were three cars parked on the side of the building near the dumpster. The Hearing Examiner places more weight on the result of eight hours of parking counts than on a 45-minute count. All of the counts were done on the hospital's busiest days, but one covered a much longer period, which logically would be more representative of typical conditions.

The proposed 24-space parking area is minimally sufficient, given that it exactly equals the total of the 18 employees that may be on site at one time, plus the six client vehicles that may be on site at one time during peak appointment hours. That leaves no extra room for delivery vehicles, people picking up food or medicine, people picking up animals after surgery, or drop-offs and pick-ups for non-medical boarding. The evidence, including Dr. Roskin's testimony, suggests that because parking is tight, vehicles park in the non-parking area on the side of the building on a regular basis, and sometimes have to be moved for the dumpster to be emptied, on Thursdays.²¹ This is not an ideal situation, but it does not appear to present a serious safety hazard. Petitioner's transportation expert testified that turning around to exit the dumpster area may require a few maneuvers, but it can be done. Moreover, with two additional spaces in the parking lot, the need to use the dumpster area should decrease. The Hearing Examiner also observes that should there be a momentary parking shortage, forcing one vehicle to wait for another to pull out, the site location and configuration make it unlikely that anyone would be tempted to park in a way that would inconvenience neighbors or other motorists.

The Board has the authority to require more than 24 parking spaces, but given that this would involve removing landscaping, increasing impervious surface, developing a new stormwater management plan and going through a site plan approval process under the Rural Overlay Zone, the Hearing Examiner considers it more appropriate to permit the proposed 24 spaces, while reserving

²¹ Perhaps Mr. Cook's staff observed little parking in the dumpster area because they made their observations on garbage day.

jurisdiction to impose additional conditions related to parking if future evidence, such as complaints from neighbors, so warrants.

- (10) The Board may regulate the number of animals that may be boarded, exercised, walked, or kept in runs or similar areas, and the manner in which animals are boarded, exercised, walked, or kept.

Conclusion: As discussed in Part IV.B, the Hearing Examiner considers it appropriate to limit the number of dogs and cats that may be boarded for non-medical reasons in any month, in order to clarify the extent to which this accessory use is permitted. The proposed conditions of approval would limit non-medical boarding to no more than 48 dogs and 26 cats in any one month. Because medically-necessary boarding is an inherent part of the hospital's function, and the only adverse impact appears to be putting pressure on the parking lot, the Hearing Examiner considers it inappropriate to place any limits on medically-necessary boarding. The Hearing Examiner notes, in this regard, that drop-offs for surgery and other procedures that require boarding typically take place between 7:00 and 8:00 a.m., when there are fewer than ten employees on site, leaving ample room in the parking lot. Only the pick-ups, therefore, would take place at times when the lot tends to be crowded.

Based on testimony and the Supplemental Statement of Operations, it appears that the hospital could easily accommodate a limit of no more than three dogs being walked outside at one time. This is reflected in the recommended conditions of approval.

- (11) The Board may regulate the office hours and the number of appointments. Animals may be seen by appointment only. Emergency patients and visits to pick up prescriptions and pet-related items may also occur, within office hours only and without prior scheduling: abuse of this exemption may lead to revocation of the special exception. A written log of all appointments and drop-in and emergency client activities must be kept, to be available for inspection by County authorities.

Conclusion: Dr. Roskin understands that with approval of this modification, the hospital will be required to begin keeping a log not only of all appointments, but also of all drop-in and emergency client activities, including non-medical boarding. The recommended conditions of approval limit office hours and appointment hours in accordance with Petitioner's submissions.

- (12) Any accessory operation, such as grooming or the sale of pet food and supplies, must be set forth in the statement of operations and must be limited as an accessory activity to a percentage of sales not to exceed 20%.

Conclusion: The Hearing Examiner considers it appropriate to require compliance with this requirement in connection with approval of the proposed modification, given that the modification involves an increase in the number of employees that reflects an increase in the size of the business. The Petitioner elected to increase the size of the business, so the imposition of additional conditions related to the size and intensity of the use is justified.

- (13) All litter and animal waste must be contained and controlled on the site.

Conclusion: The Hearing Examiner considers it appropriate to require compliance with this requirement in connection with approval of the proposed modification, given that the modification involves an increase in the number of employees that reflects an increase in the size of the business. The Petitioner elected to increase the size of the business, so the imposition of additional conditions related to the size and intensity of the use is justified. The evidence suggests that the hospital already complies with this requirement by using a dumpster for regular trash and picking up after dogs.

- (14) Animals may be kept overnight at the hospital only for medical purposes. If animals are kept for non-medical purposes, a separate application for an animal boarding place must be approved.

Conclusion: As discussed in detail in Part IV.B., the Hearing Examiner finds that the Petitioner should be permitted to continue the non-medical animal boarding that was allowed as part of the original grant of special exception, with the limitations proposed in the recommended conditions of approval.

- (15) If the proposed use is located in an area that uses well water and septic facilities, the applicant must prove that the use will not have any negative effect.

Conclusion: The site plan, Exhibit 55(b), states that the subject site is connected to public water and sanitary sewer, and depicts the locations of nearby sewer and water connections.

- (c) Any veterinary hospital lawfully existing prior to the effective date of this ordinance is a conforming use, and may be extended, enlarged or modified by special exception subject to the provisions set forth in this section.

Conclusion: As discussed in detail in Part IV.A., this provision is the basis for the imposition of new conditions on this use in connection with the proposed modification.

E. General Standards

The general standards for a special exception are found in Section 59-G-1.21(a). The Technical Staff report and the Petitioner's written evidence and testimony provide sufficient evidence that, with the recommended conditions of approval, the general standards would be satisfied in this case, as outlined below.

Sec. 59-G-1.21. General conditions:

- (a) A special exception may be granted when the Board, the Hearing Examiner, or the District Council, as the case may be, finds from a preponderance of the evidence of record that the proposed use:
 - (1) Is a permissible special exception in the zone.

Conclusion: A veterinary hospital is a permitted use in the R-200 Zone and the Sandy Spring-Ashton Rural Village Overlay Zone. See §§ 59-C-1.31 and 59-C-18.182.

- (2) Complies with the standards and requirements set forth for the use in Division 59-G-2. The fact that a proposed use complies with all specific standards and requirements to grant a special exception does not create a presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require a special exception to be granted.

Conclusion: With the recommended conditions of approval, the proposed modification would comply with the standards and requirements set forth for the use in Code §59-G-2.32, as detailed in Part IV.D. above.

- (3) Will be consistent with the general plan for the physical development of the District, including any master plan adopted by the commission. Any decision to grant or deny special exception must be consistent with any recommendation in an approved and adopted master plan regarding the appropriateness of a special exception at a particular location. If the Planning Board or the Board's technical staff in its report on a special exception

concludes that granting a particular special exception at a particular location would be inconsistent with the land use objectives of the applicable master plan, a decision to grant the special exception must include specific findings as to master plan consistency.

Conclusion: As discussed in Part II.C., the evidence supports the conclusion that the proposed modification would be consistent with the *1998 Sandy Spring/Ashton Master Plan*, which seeks to preserve the rural village character of the area and encourage compatible development.

- (4) Will be in harmony with the general character of the neighborhood considering population density, design, scale and bulk of any proposed new structures, intensity and character of activity, traffic and parking conditions, and number of similar uses.

Conclusion: With the recommended conditions of approval, the proposed modification would be in harmony with the general character of the neighborhood, considering the cited factors. There would be a minor increase in daytime population density and no change in the building exterior. The increase in employees reflects an increase in the size of the business and the intensity of the use, but the evidence suggests that this increase has not had any adverse impacts on the general neighborhood, nor is there any reason to expect any adverse impacts. The building is heavily screened by woods, most of the activity takes place indoors, and the proposed noise mitigation measures will, according to Technical Staff, make the areas where dogs are kept soundproof. The evidence demonstrates that the higher level of activity on the site has not had and will not have an adverse impact on area roads. While the number of parking spaces is not generous, the Hearing Examiner concludes, for the reasons stated in Part IV.D above, that the proposed 24-space parking lot should be permitted, with the Board retaining jurisdiction to impose additional conditions related to parking if future evidence, such as complaints from neighbors, so warrants.

No similar uses have been identified in the general neighborhood.

- (5) Will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.

Conclusion: The evidence supports the conclusion that with the recommended conditions of approval, the proposed modification would not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site.

- (6) Will cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.

Conclusion: The evidence supports the conclusion that with the recommended conditions, the proposed modification would cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity at the subject site.

- (7) Will not, when evaluated in conjunction with existing and approved special exceptions in any neighboring one-family residential area, increase the number, intensity, or scope of special exception uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area. Special exception uses that are consistent with the recommendations of a master or sector plan do not alter the nature of an area.

Conclusion: The proposed modification would not increase the number of special exception uses in the area. The evidence supports the conclusion that the proposed modification would not increase the intensity or scope of special exception uses sufficiently to affect the area adversely or alter its predominantly rural/residential nature.

- (8) Will not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.

Conclusion: The evidence supports the conclusion that with the recommended conditions, the proposed modification would not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site.

- (9) Will be served by adequate public services and facilities including schools, police and fire protection, water, sanitary sewer, public roads, storm drainage and other public facilities.

Conclusion: The evidence supports the conclusion that the subject property would continue to be served by adequate public facilities with the proposed modification.

- (i) If the special exception use requires approval of a preliminary plan of subdivision, the adequacy of public facilities must be determined by the Planning Board at the time of subdivision review. In that case, subdivision approval must be included as a condition of granting the special exception. If the special exception does not require approval of a preliminary plan of subdivision, the adequacy of public facilities must be determined by the Board of Appeals when the special exception is considered. The adequacy of public facilities review must include the Local Area Transportation Review and the Policy Area Transportation Review, as required in the applicable Annual Growth Policy.

Conclusion: Subdivision approval would not be required as a condition of approval. LATR review is not required, based on the small number of peak-hour trips generated. Policy Area Transportation Review does not apply, per the current Growth Policy.

- (2) With regard to findings relating to public roads, the Board . . . must further determine that the proposal will have no detrimental effect on the safety of vehicular or pedestrian traffic.

Conclusion: The evidence supports a conclusion that the proposed modification, with the recommended conditions of approval, would have no detrimental effect on the safety of vehicular or pedestrian traffic.

- (b) Nothing in this Article relieves an applicant from complying with all requirements to obtain a building permit or any other approval required by law. The Board's finding of any facts regarding public facilities does not bind any other agency or department which approves or licenses the project.

Conclusion: No finding necessary.

- (c) The applicant for a special exception has the burden of proof to show that the proposed use satisfies all applicable general and specific standards under this Article. This burden includes the burden of going forward with the evidence, and the burden of persuasion on all questions of fact.

Conclusion: The record substantiates a finding that the Petitioner has met the burden of proof and persuasion.

59-G-1.23 General Development Standards

Pursuant to Section 59-G-1.23, each special exception must comply with the development standards of the applicable zone where the special exception is located, applicable parking requirements under Article 59-E, forest conservation requirements under Chapter 22A, and sign regulations under Article 59-F; must incorporate glare and spill light control devices to minimize glare and light trespass; and may not have lighting levels along the side and rear lot lines exceeding 0.1 foot candles. Furthermore, under Section 59-G-1.23(g), any structure constructed under a special exception in a residential zone “must be well related to the surrounding area in its siting, landscaping, scale, bulk, height, materials, and textures, and must have a residential appearance where appropriate. Large building elevations must be divided into distinct planes by wall offsets or architectural articulation to achieve compatible scale and massing.” Under Section 59-G-1.26, a structure constructed pursuant to a special exception in a residential zone must, whenever practicable, have the exterior appearance of a residential building of the type otherwise permitted, and must have suitable landscaping, streetscaping, pedestrian circulation and screening.

Compliance with the development standards of the zone was determined at the time of the original Opinion. The proposed modification will not result in any changes to the exterior of the building or the footprint of the parking area. The site plan indicates that the building satisfies the applicable minimum setbacks. The only applicable parking space requirement is under Section 59-G-2.32, which is discussed at length earlier in this report; the parking area appears to satisfy the landscaping and screening requirements of Section 59-E-2.83. The proposed modification will not involved removing any trees or otherwise impact the extensive forest conservation easements on site. No new signage or lighting is proposed. No changes are proposed to the exterior of the building, which is, in any event, in keeping with the scale and bulk of surrounding buildings and compatible with the general neighborhood.

V. RECOMMENDATIONS

Accordingly, based on the foregoing findings and conclusions and a thorough review of the entire record, I recommend that Petition No. S-1904-A, which seeks to modify an existing special exception for a veterinary hospital located at 1300 Olney-Sandy Spring Road to approve (i) the building as constructed; (ii) an increase in the total number of employees from 12 to 24, with no more than 18 on site at one time; (iii) changes in the hours of operation and appointment times; (iv) a change in the number of parking spaces from 22 to 24; (v) the installation of noise mitigation materials in the dog boarding areas; (vi) an existing illuminated sign at the driveway entrance; and (vii) flexible vinyl fencing at the rear and partially on the sides of the building to enclose the dog-walking area, be **granted** with the following conditions:

1. Petitioner shall be bound by all of his testimony and exhibits of record, including the site plan to be submitted pursuant to Condition 3 below, and by the testimony of his witnesses and representations of counsel identified in this report.
2. All terms and conditions of the approved special exception shall remain in full force and effect, except as specifically amended by this modification.
3. Before the modification may take effect, Petitioner shall submit a site plan that has been revised to reflect the numbers of employees permitted under the terms of the modification: a total of 24 employees with no more than 18 on site at one time. The revised site plan shall also specify that no more than six patients may be on site at one time for appointments, excluding emergencies and patients on site for surgical or other procedures.
4. The hospital may have no more than 24 employees, and no more than 18 employees may be on site at any one time. The non-medical boarding facilities shall be limited to a total of two staff.

5. Hours of operation shall be as follows:
 - 7:00 a.m. to 7:30 p.m., Monday through Thursday
 - 7:00 a.m. to 6:00 p.m. Fridays
 - 8:00 a.m. to 5:00 p.m. Saturdays
6. Appointments shall be scheduled at 20- or 30-minute intervals during the following time periods:
 - 9:00 a.m. to 1:00 p.m., Monday through Saturday
 - 2:00 to 4:00 p.m. Monday and Thursday
 - 1:00 to 3:00 p.m. Tuesday
 - 4:00 to 7:00 p.m. Monday through Thursday
 - 3:00 to 5:00 p.m. Fridays
7. No more than four veterinarians may be on site at one time. No more than three veterinarians may see patients by appointment during any appointment period, e.g. 9:00 a.m. to 1:00 p.m.
8. Non-medical animal boarding shall be limited to a maximum of 48 dogs and 26 cats boarded during the course of any month. No animal shall be accepted for non-medical boarding without a record of having received medical care at the hospital during the previous 18 months.
9. The number of functional compartments in the non-medical dog ward shall be reduced to 26 within 60 days of the Board's Opinion on this modification.
10. The parking area shall be brought into conformance with the site plan submitted pursuant to Condition 3, including the addition of two spaces, within four months of the Board's Opinion approving this modification. The Board of Appeals reserves jurisdiction to impose additional conditions related to parking in the event that future evidence, such as complaints from neighbors, so warrants.
11. Petitioner shall maintain a written log of all appointments and drop-in and emergency activities, including animals admitted for surgical or other medical procedures, emergency visits, visits to the site for retail items such as food or medications, and drop-offs and pick-ups for non-medical animal boarding.

12. All exterior lighting shall be turned off at 9:00 p.m., except motion-sensor lighting that the Petitioner considers necessary for safety and security.
13. No more than three dogs may be walked outside at any one time. All dog walking shall take place within the fenced area designated "Animal Exercise Area" on the site plan to be submitted pursuant to Condition 3 above.
14. In compliance with Section 59-G-2.32(b)(12), any accessory operations, such as grooming, the sale of pet food and supplies, and non-medical animal boarding, must be limited to a percentage of sales not to exceed 20 percent.

Dated: March 9, 2007

Respectfully submitted,

Françoise M. Carrier
Hearing Examiner